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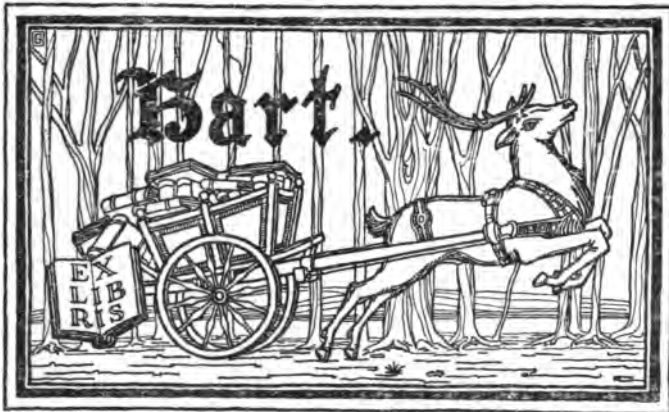
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***The American Republic and Its Government***

An Analysis of the Government of the United States, with a Consideration of its Fundamental Principles and of its Relations to the States and Territories. 8°.

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**G. P. PUTNAM'S SONS**

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**AMERICAN POLITICS**

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**THE AMERICAN REPUBLIC  
AND ITS GOVERNMENT**

**AN ANALYSIS OF THE GOVERNMENT OF THE UNITED STATES  
WITH A CONSIDERATION OF ITS FUNDAMENTAL  
PRINCIPLES AND OF ITS RELATIONS TO  
THE STATES AND TERRITORIES**

**BY**

**JAMES ALBERT WOODBURN**

**PROFESSOR OF AMERICAN HISTORY AND POLITICS  
INDIANA UNIVERSITY**

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## PREFACE

**I**T is the purpose of this book and of its companion volume, *Political Parties and Party Problems in the United States*, to attempt an addition to the works designed for the encouragement of the study of American politics. This volume has to do with the original principles of the Republic as announced by the Fathers in the struggle for Independence, and with the principal institutions and organs of government created by the Constitution.

The greater part of this field has been traversed by many writers, and its principal subjects are treated of by all text-books on Civil Government. Most of the text-books in Civics, however, have been, at least until very recently, class-room hand-books dealing very briefly and disconnectedly with a large variety of topics, and designed for young students in the first year of the high school, or below. Mr. Bryce's great work, *The American Commonwealth*, has done much during the last decade for the promotion of political education among American students and readers; and in our institutions of higher learning, where elective courses of considerable length are offered in political science and the study of the American Government, it has been indispensable, as it will probably continue to be in its special field for a generation to come. I wish to acknowledge my great indebtedness to Mr. Bryce for the constant use of his work in the class-room as well as in the preparation of this work; and if this volume should do anything toward promoting a larger

use of *The American Commonwealth* and books of its kind—there are none of its rank—among high schools, academies, and colleges, it will not have been published in vain.

With a view to this larger study of American politics, and as leading up to it, it seems to me necessary to recognize that between the field for the elementary text-books in Civics and that of the advanced classes in the universities that call for special and extensive study in works like that of Mr. Bryce, there is an intermediate field. My effort has been to fill this gap, to provide an intermediate book for advanced courses in high schools or for elementary courses in the colleges. It is believed that in this field of Civics there are classes of students well prepared for more advanced work than is ordinarily pursued in high schools, whose interest will be more easily and effectively aroused and sustained by a somewhat elaborate discussion of the more important subjects in the study of the American Government and its principles. For this purpose it seems better to present more extensive treatment of fewer subjects than to reconsider the great variety of miscellaneous topics usually contained in the books on elementary Civics.

It is one of the first purposes of public education in America to induce the youth of the land to understand the Constitution of their country, the principles that underlie it, how it has grown, the perils that have threatened it, the wisdom and courage that have sustained it and made it great. This is to be learned chiefly from our country's history. It is a field of reading and study that should be inviting to all American citizens. It is my hope that this book may in some degree, for the sake of a higher citizenship, promote the study of history, politics, and the problems of government.

J. A. W.

INDIANA UNIVERSITY, BLOOMINGTON, INDIANA,

January 20, 1903.

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# THE AMERICAN REPUBLIC

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## CHAPTER I

### THE PRINCIPLES OF THE FATHERS

**T**HE great text-book for the study of politics is history. He who would understand the principles of our Government and the institutions that have been built upon them must look to the history out of which these principles and institutions have emerged. Without a knowledge of the past we cannot understand the present.

In 1763, after a half-century of conflict, the English had triumphed over the French in America. Under the treaties of that year closing the Seven Years' War, the French retired from the North American continent, and the English rule was established in Canada and in the territory east of the Mississippi. To meet the increased burden of an increased debt and of enlarged possessions, the English Ministry under George III. resolved upon three measures which Mr. Lecky, the great English historian, has said produced the American Revolution:

**Causes of the  
American  
Revolution.**

1. The enforcement of the old trade laws.
2. The quartering permanently in America of a portion of the British army.
3. The raising by Parliamentary taxation in America of a part of the money necessary for the army's support.

## The American Republic

X The English Commercial Code Violates Sound Principles of Government. The old trade laws, which had been passed chiefly in the interest of the English trading companies, were obnoxious and vexatious to the Colonies, and they had been allowed to fall into disuse. By these laws the Colonies were not allowed to establish manufactures for themselves, nor to carry on a profitable trade with other countries. The English commercial code thus violated the fundamental principle of just government, that laws should be in the interest of the people who are bound to obey them. The attempt to revive and strictly to enforce these obsolete laws thus became a contributing cause of the American Revolution: and in so far as the Americans resisted these laws, they did so as claiming a right to freer trade and freer industry; in short, as asserting their right to regulate their manufactures and commerce in their own interest.

X Opposition to a Standing Army. The dread of a standing army had been a powerful influence with the common people of England ever since their struggle against the tyranny of the royal power in the days of the Commons' revolt against the Stuart kings, 1642-1649. Especially was this feeling strong among those English Puritans and Cavaliers who "in an unconquerable spirit had effected settlements in the distant and inhospitable wilds of America." They held with a stubborn and undaunted spirit that no army should be quartered upon them except by the consent of their own legislatures. Every State or colony—that is, every organized political community like Massachusetts, Virginia, or Rhode Island, they declared, "must judge for itself the number of armed men which they may safely trust among them, of whom they are to consist, and under what restrictions they are to be laid."<sup>1</sup> Reliance on their own militia and opposition to a standing army larger than was necessary to preserve

<sup>1</sup> Jefferson's *Summary View of the Rights of the Colonies*.



the peace involved one of the early principles of the Republic.

But it was especially the controversy raised by the new Imperial policy of taxation that led to the dismemberment of the British Empire and to the independence of America. In the long discussion between Great Britain and the Colonies touching Imperial power and colonial rights, from the passage of the Stamp Act in 1765, till the Declaration of Independence proclaimed a new nation to the world, the colonists stood out for the following rights and principles:

1. *The right of constitutional government.*—Great Britain claimed, while the colonists denied, that Parliament could exercise an unlimited power over them, “to bind them in all cases whatsoever.” The colonists had no voice, and from the nature of the case could have none, in the body proposing so to govern them. The great remedial measures guaranteeing the ancient rights of subjects, such as the Great Charter, the Habeas Corpus, the Bill of Rights,—that is, the law, customs, precedents, and constitutional statutes which made up the British Constitution,—were in full force in the Colonies. By this Constitution Parliament must be bound. The colonists held that their charters also conferred and defined certain constitutional rights and limited the powers of government over them. English law and liberty, they claimed, knew no such thing as absolute, unlimited power, without constitutional limitations and restraints. The colonists contended not for new rights but for old ones, not for innovations or a new constitution, but for their old charters and the old Constitution with its privileges and guarantees. They had lost none of their rights by migration. Whatever were the constitutional rights of Englishmen at home were the constitutional rights of Englishmen in the Colonies. With our fathers, wherever they went throughout the world, their Constitution and their law followed their flag.

The Right of  
Constitutional  
Government.

" All we have of freedom, all we used or know,  
 This our fathers bought for us, long and long ago;  
 Ancient Right unnoticed as the breath we draw,  
 Leave to live by no man's leave underneath the law."<sup>1</sup>

2. *The right of local self-government.*—To the colonists this was a necessary corollary to the rights of constitutional government. The foundation of English liberty and of all free government is the right of a people to participate in their legislative council. This meant, in 1776, the free and exclusive power of legislation in the colonial assemblies,—in all cases of taxation and internal policy.<sup>2</sup> The colonists held that, while matters of Imperial concern, and especially the commercial system, should remain under the control of the Imperial Parliament, each Colony should regulate for itself its own local affairs; that the colonial assemblies were complete and independent legislatures for all matters of internal concern. Each Colony was "a people." In the exercise of this right of local self-government,

" the Colonial legislatures with the entire assent of the Home Government assumed the right of modifying almost every portion of the common and of the statute law, with a view to their special circumstances. It became recognized that *the Colonies might legislate for themselves as they pleased*, provided they left untouched their allegiance to the Crown and acts of the English Parliament."<sup>3</sup>

In internal matters they claimed therefore not to be under the jurisdiction of the British Parliament, and that they did not hold their political existence at the will of that body; that the rights—original and chartered and

<sup>1</sup> Kipling, *The King*.

<sup>2</sup> Resolution of the Continental Congress, October 24, 1774.

<sup>3</sup> Lecky, *American Revolution*, p. 39.

guaranteed—of one part of the Empire should not be sacrificed to the desire and power of another part, and that one legislature, like that of Great Britain, should not be allowed to infringe upon the rights and liberties of another legislature, like that of Virginia or of New York. Therefore, it was held, when Parliament attempted to suspend the legislature of New York for refusing compliance with the Mutiny Act of 1765, quartering troops in America, that “one free and independent legislature had taken upon itself to suspend the power of another, free and independent as itself.”<sup>1</sup> It was the right of every State to govern itself within its own local rights and limits. The colonists declared the taxing and coercive acts of Parliament void, because by the principles of the English Constitution and by colonial charters Parliament had no right to exercise such authority within these Colonies. For these reasons the suspension of their legislatures was held to be an act of usurpation and tyranny, and in case of continued suspension the powers of these bodies reverted to the people; and the colonists believed that to make their judges and governors independent of their assemblies, and dependent merely on the royal will and favor for their tenures and their salaries, was an interference with the right of self-government. States’ rights, as against Imperial or central authority, *in all matters of domestic concern*, was an original and primitive principle in the history of the United States.

3. *The right of trial by a jury of the vicinage.*—The courts of admiralty had been empowered to try violations of the Stamp Act and other acts enforcing the trade laws. In these courts a jury trial was denied. And, also, as a means of meeting colonial resistance, an old law of the time of Henry VIII. was revived which empowered a colonial governor to bring to England for trial persons accused of treason outside of

The Right of  
Trial by  
Jury.

<sup>1</sup> Jefferson's *Summary View of the Rights of America*.

England, "transporting them beyond seas to be tried for pretended offenses."<sup>1</sup>

"By this act," says Burke, "almost all that is substantial and beneficial in a trial by jury is taken away from a subject in the Colonies. To try a man under that act is, in effect, to condemn him unheard. A person is brought hither in the dungeon of a ship's hold; thence he is vomited into a dungeon on land, loaded with irons, unfurnished with money, unsupported by friends, three thousand miles from all means of calling upon or confronting evidence, where no one local circumstance that tends to detect perjury can possibly be judged of,—such a person may be executed according to form, but he can never be tried according to justice."<sup>2</sup>

To this violation of one of the dearest rights of Englishmen, the colonists set themselves in determined resistance.

4. *The right of free assembly and the right of petition.*  
—The right of petition was repeatedly exercised without restraint, though the colonial petitions were as repeatedly slighted and disregarded. The right of assembly and free discussion, "a right formidable to tyrants only," was threatened by the Massachusetts Act of 1774, by which the charter of that Colony was radically changed, and the right of free discussion in the old Town meeting was seriously abridged. Hereafter none but election meetings were to be held and no subject was to be discussed except by permission of the royal governor. Such an act brought consternation to every Colony in America. It was such coercive laws that brought the colonists into union to resist what they considered a series of unconstitutional measures that were annihilating their chartered liberties, abolishing their most valuable laws, and altering fundamentally the forms of their government.

<sup>1</sup> Declaration of Independence.

<sup>2</sup> Letter to the Sheriffs of Bristol.

5. *The right of self-taxation*: "No taxation without representation."—The Stamp Act of 1765 was an attempt to impose by parliamentary power a direct domestic tax upon the Colonies. The Imperial Government had previously exacted some payments at the customs houses upon the trade of the Colonies. But this was not done for purposes of revenue. It was done to regulate the trade of the Empire, to enable the British trade to surpass that of the Dutch or the Spanish or the French; and, as "an instrument of empire," since it was taxation for commerce and not for revenue, the colonists had been willing to bear this burden for the sake of the common Imperial interests. The colonists called this an *external* tax. Such measures were looked upon as trade regulations rather than as measures of taxation. When it was desired that the Colonies should contribute to the extraordinary expenses of the Empire in money or troops for a foreign war, requisitions were applied for. That is, the king, through the person of his royal governor in the Colony, asked for the supplies, and the Colony through its representative assembly gave and granted the substance of the colonists. This was the *old system* of securing supplies to the Crown to which Burke pleaded that the Parliament should return, and from which, as he thought, it ought never to have departed. This was the *old practice* on which Pitt based his constitutional theory that taxation was no part of the legislative power; that taxes were a free gift of the people to be voted, or refused, by the representatives of the people who were expected to pay the tax. This was the *old custom*—which with Englishmen was the *law*—that was sustained by so many precedents in English history. On four memorable occasions, by four great and notable statutes, the English people had recognized the American contention

The Right of Self-Taxation:  
"No Taxation without Representation."

External Taxation.

Selection  
The Constitutional System of Requisitions.

that there should be no taxation without representation :

*In 1215, by Magna Charta*, it was agreed as a principle of the Constitution that no aid (tax) should be imposed except by the common council of the nation, and all estates, or classes, that were to pay were to be summoned, in the persons of their representatives, to the national council.

*In 1297, by a statute concerning taxation without consent*,<sup>1</sup> the principle of no taxation without representation was again recognized and confirmed.

*In 1628, in the celebrated Petition of Right*, this statute was quoted and the Charter was again confirmed, and it was again declared that no "aid should be levied, except by the good will and assent of the national representatives."

*Again, by the glorious Revolution of 1688*, this principle was reaffirmed on one of the most solemn occasions of the nation's history.

It was clearly the law and the usage that taxation without consent was illegal; that taxes were to be imposed only by the representatives of those who were required to pay them. By struggle after struggle this right to be consulted as to when and how much they should pay into the king's treasury had been *wrought out* by the English people. It was their *experience* that this was the safe, constitutional mode of taxation. This right was again and again encroached upon and denied by the royal power, but it was as often recovered and vindicated. And each time the practice was reasserted it became more firmly embedded as a principle in the national conduct and Constitution. In speaking of the Stamp Act, with this experience of the nation in view, Mr. Lecky says:

"The measure did unquestionably infringe upon a principle

<sup>1</sup> *De Tallagio non Concedendo*, 1297,

which the English race both at home and abroad have always regarded with a peculiar jealousy. The doctrine that taxation and representation are in free nations inseparably connected, that constitutional government is closely connected with the rights of property, and that no people can be legitimately taxed except by themselves or their representatives lay at the very root of the English conception of political liberty."<sup>1</sup>

Taxation and  
Representa-  
tion Go  
Together.

X

In opposition to the new taxing policy of Parliament involved in the Stamp Act, the colonists expressed this old English principle substantially as follows:

"That it was essential to the freedom of a people, and the undoubted right of Englishmen, that no taxes be imposed on them but with their own consent, given personally or by their representatives.

Statement of  
the Stamp

"That the Colonies could not be represented in Parliament and that their only representatives were persons chosen therein by themselves, and that no taxes ever have been or can be imposed on them but by their representative legislatures.

Act Congress,  
1765.

"That all supplies to the Crown being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the English Constitution for the people of Great Britain to grant the property of the colonists."<sup>2</sup>

This is not to be thought of as a *theory* which, once thought out *a priori* by some great thinker or statesman, had then been promulgated for the nation and for the future. Our fathers did not deal with theories in that sense. But the maxim, "No taxation without representation," is to be looked upon as an attempt to deduce from their history and to formulate what had been a long-standing practice. *It was a description of what had been*, so far as they and their estates were concerned. It did

<sup>1</sup> *American Revolution*, p. 75.

<sup>2</sup> Resolutions of the Stamp Act Congress, 1765.

not relate to the rights of individuals or of minorities. It was not intended to assert that "a man's property is absolutely his own, and that what he has acquired cannot be taken from him without his consent"; although such language was used by the advocates of the colonial cause both in England and America.<sup>1</sup> All men wish not to be taxed, and very few men give their consent to all their taxes. If no tax could be collected except what every man willingly consented to, society would be reduced to anarchy. Nor was it intended to assert by the phrase, "No taxation without representation," that all persons who paid taxes should be represented in the legislature that imposes the tax. The doctrine was formulated to vindicate the right of one class or estate in the realm against another, or to vindicate the right of one body politic against another claiming superior authority. However, it may be fairly claimed that the logical inference is that equal rights in taxation of individuals within a state should prevail. For, when we say that taxation and representation should go together, we clearly assert that all who pay taxes to the state should have a voice in determining their assessment and distribution.

The controversy over these issues led to the Declaration of Independence, July 4, 1776. In this great document, which Buckle calls "that noble Declaration which ought to be hung up in the nursery of every king and blazoned on the porch of every royal palace," our Fathers announced their theory of government to the world. The memorable words in which they then announced their principles of government should be stored in the memory of every citizen of America:

"When in the course of human events it becomes necessary for one people to dissolve the political bands that connect them

<sup>1</sup> Pitt on American Taxation. Samuel Adams; Massachusetts Circular Letter, 1768.



with another and to assume among the nations of the world that just and equal station to which the laws of nature and of nature's God entitle them, a decent regard to the opinion of mankind requires that they should make known the causes leading to the separation. We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights, among which are life, liberty, and the pursuit of happiness; that to secure these rights governments are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government, laying its foundations in such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness."<sup>1</sup>

This Declaration teaches:

1. That men have rights. Among these are life, liberty, and the pursuit of happiness.
2. That governments are instituted for the benefit of the governed,—to secure and protect these rights of men.
3. That these governments "derive their just powers from the consent of the governed."
4. That whenever any government becomes destructive of these rights, it is the right of the people to overthrow it; and when the people have overthrown a perverted government, it is their right and duty to establish a new government on whatever principles and in whatever form will ensure the public safety and happiness.
5. That, under law and government, and in the protection of these rights, "all men are created equal."

These principles were announced as self-evident,—as if they had only to be stated in order to be accepted. Yet, perhaps, no political platform of equal length in all human history has been the subject of greater controversy and dispute; and no statements have been more

<sup>1</sup> Preamble of the Declaration of Independence.

persistently misunderstood and misconstrued. Some, false to these principles, have sought to bring them into disrepute by a false and literal interpretation. Others, lacking an intelligent conception of their meaning, have been too easily disposed to reject them as untenable. It is important that the children should know what the Fathers believed, and they should be ready, if need be, to defend those beliefs. In order to do this and to repel the constant attacks upon the famous Declaration of the Fathers and to expose the frequent perversions and repudiations of their principles, it is necessary to know what our Fathers really believed.

In approaching this subject it is important to bear in mind that in politics, in the practical business of governing, there are no political policies and programs suitable for universal application. A proposition in politics depends for its truth upon the sense in which it is intended, or, often, on the circumstance or relation to which it applies. We may assert that a republic is the best form of government, or that manhood suffrage should prevail, that the majority should rule, and that self-government should be established among men. These things may be true for us and for many other peoples. Our fathers believed that some of these things were true for them and for their children ; but no one has ever maintained, and the Fathers of this Republic should never be accused of maintaining, that these statements were universally true for all peoples, in all times, and under all circumstances. This is not to say that there are no political principles that are fixed and abiding, or that a nation's principles should depend upon its circumstances. Politics is a part of man's life and in man's life there are principles that are divine, that proceed from the very nature of God and man, and that are, therefore, absolute, eternal, and unchangeable. Times may change, and men may change with them, but principles do not change. In spirit the

principles of our fathers abide, and they are the same to-day as when they were announced in 1776. "The letter killeth, the spirit maketh alive." It is not the form but the spirit of truth that is eternal. It is the political spirit that controlled the political lives of the Fathers that we must seek.

This is quite consistent with the recognition of the fact that political doctrines are to be studied in relation to their times; that political doctrines are relative; that in order to see whether they are true or false it is necessary to see them in relation to the doctrines that they oppose; that the science of government, if it be not "the science of circumstances," as Burke has defined it, is at least an historical science—that is, its premises have their foundations in experience. The political principles that our fathers announced were not spun out of their heads; they were not evolved from the inner consciousness of some philosopher shut up in a closet: but their principles came out of their lives, were evolved from their experience and from the circumstances in which they were placed. They must, therefore, be studied and fairly interpreted in relation to this experience and history. History teaches us *how* these principles came to be, and if we wish to know their meaning we must know them in their *development* and in their *cause*. It is only in this way that we can come to know the sense and spirit of a body of principles. To attempt to express one's principles in a maxim and to offer this maxim as of universal application, is not a scientific or sensible process in government. To affirm a political proposition absolutely; to assert positively, once for all, for illustration, that "governments derive their just powers from the consent of the governed," would be as unwise as to deny this absolutely. Not absolute maxims, but the principle underlying the maxim is what we should seek.

Bearing these things in mind, we may come to the arti-

Political  
Doctrines  
are Relative.

The Science  
of Govern-  
ment is an  
Historical  
Science.

X

cles of political faith which our fathers announced and not hesitate to accept them when truly and fairly interpreted.

1. *Men have rights.*—It would be unprofitable here to go into a discussion of the theory of natural rights. Our

**Men have Rights.** fathers thought very little of pure theory in politics and we should theorize as little as they.

It is sufficient to ask,—What were the two opposing practices on this subject which confronted our fathers as the outcome of their historical experience? On what opposing policies did they base their doctrine?

(1) One view insisted upon the absolute authority of the sovereign, declaring that no rights can exist in opposition to the sovereign's will.

**Absolutism vs. Rights of Man.**

(2) The other insisted upon certain natural rights of individuals which the sovereign can never legally infringe.

For more than a century men had been in contention over these theories. The defenders and apologists of the royal power in England had taught that all men were born under the necessity of submitting to an absolute kingly government; that he that had the power had the right; whether he came to his place by election, inheritance, usurpation, or any other way, the persons and estates of his people were subject to his will, and none should oppose that will. To fight

**Divine Rights of King and Passive Obedience.**

against that will was to fight against God, for all powers that be were ordained of God and the king was God's anointed. James I. voiced the idea of kingly absolutism: "As it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do." After the Revolution of 1688 the Church and all the royal party continued to teach that the king's right was divine, different not only in degree but in kind from every other power in the state; that resistance to him was in all cases a sin. On

the day that Algernon Sidney was executed, December 7, 1683, a few moments before his head fell into the basket, he handed the sheriff a paper reviewing his case. The doctrine of tyranny stated above is in substance as Sidney stated it in his dying words. It was for opposing that doctrine that Sidney sacrificed his life. What a legacy to our fathers was the memory of a martyr like Sidney! In his life and death—and he was but a type of many—he exemplified the principles of this Republic. Many of our fathers in the Old World, like Sidney, gave up their lives, and many more gave up their homes, in opposition to these doctrines and practices of despotism. As is well known, the founders of these States were, for the most part, political and religious exiles who carried with them to the New World the spirit of resistance to tyranny and oppression. The Fathers of our Revolution were their children and they were deeply imbued with the opposing principles of liberty taught by Pym and Milton and Harrington and Sidney and Locke. With them, the question of human rights was settled. Whoever would dispute about that, let him dispute. But for them and for their children, in the state which they were founding, they would declare that

Sidney  
Vindicates  
Principles of  
Liberty.

Y

*"whenever any prince, or legislature, or government should endeavor to take away or destroy the property of the people, or to reduce them to slavery under arbitrary power, the people were then absolved from any further obedience and are left to the common refuge which God hath provided for all men against force and violence."*<sup>1</sup>

Locke and  
the Right of  
Revolution  
and  
Resistance.

X

From this it will be seen that our fathers knew their rights; and that they asserted the righteousness, and would dare the dangers, of revolution in order to maintain those rights.

<sup>1</sup> Locke, *Treatise on Government*, chapter on "The Dissolution of Government."

This, indeed, was nothing new in 1776. Our fathers were simply maintaining the old principles of civil liberty which had been taught them in England, and which, it was supposed, had triumphed finally in the English Revolution of 1688.

2. *Governments are for the benefit of the governed.*—Little need be said on this proposition. It needs no proof. It comes as near to being self-evident as any proposition in politics can come. Even the kings of earth, the absolute rulers who hold by an hereditary title and who still claim to rule by divine right, generally confess that they hold their office for the benefit of the nation, that they are bound to rule in such a way as to promote the welfare of the people governed. The Stuart kings of England acknowledged that they were bound to exercise their powers in such a way as to promote the common welfare. The difference between these kings and their Puritan Parliaments was that the Stuarts proposed to be guided only by their own sense as to what the public welfare required.

While this principle of government for the governed seems obvious to us, we must remember that the opposite principle was constantly being practised and insisted upon by rulers and emperors and kings. A large part of the history of the Roman Empire merely illustrates the practice of looking upon government as an institution to be used for the benefit of the governors,—for the benefit of a governing class. Provinces were conquered that they might be taxed and the taxes expended, not in the provinces for the benefit of the people who paid them, but that these revenues might be sent to Rome to be used there for the benefit of a rich, luxurious, and imperial oligarchy. Spain acted upon the same principle. During her centuries of colonial misrule, from the time Columbus discovered America until she lost Cuba and the

Old  
English  
Principles.

Governments  
are for the  
Benefit of the  
Governed.

Rome and  
Spain Violate  
the Principle  
of Govern-  
ment for the  
Benefit of the  
Governed.

Philippines, Spain constantly exploited her colonies for her own benefit, taxing and oppressing and defrauding the colonists for the benefit of Spaniards at home, for the enrichment of the rulers who had charge of the government in Spain. It is not to be wondered at that Rome was finally dismembered, and that Spain constantly suffered from rebellions in her colonies and that she has now lost them all.

It was so in our own Colonies. In proportion as Great Britain governed us in our own interest, promoting our trade and prosperity by wise and unselfish laws, there were loyalty and love for the mother country. But in proportion as the Colonies were exploited for British benefit, as our trade was restrained and manufactures suppressed to promote the interests of British trading companies at home, and as we were taxed to relieve Englishmen from taxation,—just in that proportion were there friction, resistance, disloyalty, and disunion. Our fathers, therefore, with this experience before them, announced it as one of the great lessons of history, as one of the fundamental principles of the state, that governments should exist for the benefit of the governed. History had made this so evident that it seemed to them self-evident. No one can be more recreant to his country than the American who would use a public office not to promote the public welfare, but for the benefit of himself and his friends.

Rulers are  
Trustees ;  
Public Office  
a Public  
Trust. X

It is one of the first fundamental principles of the Republic that a public office is a public trust.

But the Fathers announced more than this.

3. *Government by the consent of the governed.* Our fathers asserted, not only that government should exist for the benefit of the governed, but that it should exist by the consent of the governed ; it should be *by* the people as well as *for* the people. "Governments derive their just powers from the consent of the governed."

Government  
by the  
Consent of  
the Governed. ✓

This maxim has been the subject of so much misunderstanding and of so much controversy; its reckless use has led to so much confusion instead of enlightenment, that it becomes necessary to dwell at some length upon the meaning with which it is to be received.

What did our fathers mean by such a saying? How does government rest on consent? There are so many instances where it appears that government rests on force; the maxim is seemingly so contrary to history, to our own national experience, and to the accepted facts of our national life, that such a saying seems impossible of belief. After we purchased Louisiana, in

1803, we proceeded to govern the people of that Territory without their consent. We did the same with the inhabitants of Florida after 1819, and of the Mexican cessions after 1848. The people of the District of Columbia and of all the Territories have no voice in determining their fundamental law or the form of their government. We prevented secession by war and crushed the rebellion by national authority against the consent of the Southern people. Many half-civilized tribes of Indians have been—and ought to have been—governed against their wills. More than half of the nation, the women and children, have no voice of consent in their own government. Other illustrations of apparent inconsistency with the principle of the consent of the governed might be given. Must we admit, then, that we are false to our principles and unwilling to live up to them? Or, must we abandon the doctrine of the “consent of the governed” as unsound and untenable? It is

always immoral and fatally injurious to character to profess one life and to live another. If our profession be not true, we must abandon it, openly and honestly. If it be true, we must be ready to explain our faith and adhere to it.

Consent of  
the Governed  
Seems Incon-  
sistent with  
the Accepted  
Facts of our  
National  
Life.

Value of  
Political  
Consistency.



Obviously the phrase the "consent of the governed" has been misunderstood and misapplied. In order to understand its true scope and significance it is well to recognize first what it does not mean.

I. *It does not mean that government derives its authority from a social compact.*—Our fathers did not announce the social-contract theory of government. This theory teaches, in substance, that once, when men were in a state of nature, free from the restraints, obligations, and benefits of government, they agreed together to surrender some of their liberties in return for the order, protection, and benefits of government, and that out of this social contract, or covenant, or compact, government grew and derived its authority. This theory is unhistorical and unsound. No such "social contract" was ever made, and government does not derive its authority from such a source. The framers of the Declaration of Independence—men like Franklin, Sherman, Livingston, and John Adams—did not believe this theory, nor did they teach it to the world. Jefferson may have been influenced by it, and though some of his utterances seem based upon it, there is no evidence that he regarded "government by the consent of the governed" as resting upon the basis of the social contract. It is not in the sense of Rousseau's *Social Contract* that the consent of the governed is to be considered. Taken in that sense it would be an unprofitable subject of study.<sup>1</sup>

Government  
by Consent  
does not Rest  
on the  
Theory of  
a Social  
Compact.

But there was a sense in which our fathers believed in the compact theory, or the doctrine of contract, as applied to their government. They accepted it as opposed to the theory of the divine right of kings. Our fathers

<sup>1</sup> For further study of this subject see : Rousseau, *Le Contrat Social* ; A. Lawrence Lowell, *Essays on Government* ; Lyman Abbott, "The Rights of Man," *The Outlook*, 27th April, 1901 ; Giddings, *Democracy and Empire* ; John Morley's *Essay on Rousseau*.

were undoubtedly adherents of the doctrine that their kingly government existed by right of contract between the king and his people, and that they were not bound in passive, abject obedience to a divinely appointed king. Their kings ruled by agreement, not by indefeasible hereditary right. Their doctrine was sustained in philosophy by Milton, Locke, and Sidney, and later by Priestley and Price and Godwin. It was regarded as an exhaustive division of all theories of government that they came from divine right, paternal authority, or in compact. The first two were regarded as identical. So, as the alternative was divine right or compact, our fathers accepted the latter. In this sense the compact theory was nothing more than an attempt to frame a theoretical formula to justify revolt against oppression and tyranny.<sup>1</sup> The Whig theory of the English Revolution of 1688—which was the theory of the American Colonies—was that the king had forfeited the crown by breaking the contract between the king and the people; that the throne was thereby vacant, and the nation should elect; that in determining the succession, the nation, through its representative legislature, should impose such conditions as would in future insure the country against misgovernment. In harmony with the Whig theory, the Commons solemnly resolved: “*That King James II., having endeavored to subvert the Constitution of the kingdom, by breaking the original contract between king and people, and having violated the fundamental laws and withdrawn himself out of the kingdom, has abdicated the government and the throne is thereby vacant.*”

The theory of Locke and Sidney had triumphed over that of Filmer. It was afterwards reasonably held that by this Revolution the English people had acquired three fundamental rights:

<sup>1</sup> Leslie Stephen's *History of English Thought in the Eighteenth Century*, vol. ii., pp. 136, 142.

- (1) To choose their own governors.
- (2) To cashier them for misconduct.
- (3) To frame a government for themselves.<sup>1</sup>

Though Burke laboriously denies that these rights are to be derived from the English Revolution of 1688, we may fairly claim that they are undeniably grounded in the American Revolution of 1776, and that the old Whig theory of contract is sound wherein it teaches that if the people are fundamentally injured by the subversion of their government, the people have the right to save or recover by resistance the constitution and the liberties to which they had an original title.

II. *It must also be clear that "consent of the governed" does not mean that all people are capable of self-government, that all people should be allowed to make and administer their own laws.*—That would be foolish and absurd. Does any one suppose that the hard-headed framers of the Declaration of Independence believed such a thing? It is obvious that children must be obedient to authority, to be restrained and governed, often against their wills, by those who care for them and who are older and wiser than they. It is so with semi-civilized and savage tribes of men. They have no right to follow their own caprice; to destroy their own lives; to enslave one another; to lay waste, or leave waste, the land that God has given them; to live without law and order, in recognition of no law except that "might makes right." If such a people have an inheritance of land and opportunity, that inheritance will be taken away and given to another. Such is the law of nature and of nature's God,—the God in whom, above all, our fathers believed. It is clearly the right and duty of a people wiser and better and stronger than the ignorant and the uncivilized to

Consent of  
the Governed  
does not  
Mean Self-  
Government  
for all Sorts  
and  
Conditions  
of Men.

X

<sup>1</sup> Dr. Richard Price, "Discourse on the Love of Country," November 4, 1789, cited by Burke in his *Reflections on the French Revolution*.

govern these and to direct them into law and order for their greater safety and security. The wiser and the stronger, it is true, must recognize the principle of responsibility, that they are responsible for governing justly and in the interest of the governed, but the fact must also be recognized that the unfit, the imbecile, and the vicious have no right to govern, not even the right to govern themselves. The criminal must be restrained and imprisoned by authority and righteous force. The idiot and the insane must be cared for by those who are benevolent and wise. In short, the incapable must be governed by the capable. Our fathers in their Declaration of Independence did not deny any of these plain propositions.

III. *In the third place, the "consent of the governed" does not mean that suffrage is an inherent right and that political power in the state should be conferred on all*

X  
Consent of  
the Governed  
does not  
Mean that  
Suffrage is an  
Inherent  
Right.

*alike.*—The doctrine does not require that the state, under all conditions, should be placed in the power of the mere numerical majority. Nothing could be more inconsistent than this with both the principles and practices of the

men of '76. Our fathers never believed that suffrage was an inherent right. They uniformly treated it as a privilege to be conferred for fitness. Of the three million

Who  
Consented  
to the  
Revolution?

people in America in 1776, five hundred thousand were negro slaves; more than five hundred thousand were women; one million were minors; several hundred thousand were Indians. One third of the whites opposed the Revolution. There were property qualifications for suffrage, sufficient to prevent many more whites from participating in the government. It is certain that the slaves were not canvassed, that the Indians were not consulted, that the women and children had no votes, and that the Tories were voted down. With all these conditions how small a proportion of the people of America consented to the Rev-

olution and to the adoption of the Constitution! Clearly, it was only an insignificant minority of a ruling race.

It may be said by some that, while this was so, the Fathers announced a principle that was subsequently to modify and correct their own practice. This is true to a great extent, but it is still clear, both from their principles and their practice, that nothing was further from the meaning and intention of their declaration than that all men of whatever kind should be left free at all times to govern themselves or to control the political power of the state. Such an assertion would be too flagrantly inconsistent with the conduct of the Fathers, and in all the history of our national life no attempt has ever been made to carry such an assertion into practical application. Nor does loyalty to the principles of the Declaration of Independence require it. The Fathers knew, as well as we, that self-government involves both *liberty* and *capacity*. It involves liberty from caprice and passion and prejudice and criminality. It involves capacity to know and to do what is best for all concerned,—for those who are in authority and for those who are under authority. No people have a right to self-government—to government by their consent—unless they can show a reasonable measure of liberty and capacity.

Self-  
Government  
Involves  
Liberty and  
Capacity.

x

There are many illustrations in our history that will help to make this clear and emphatic. After our Civil War, when the slaves of the South had been emancipated, these freedmen were given political power. The ballot was placed in their hands, while many of the intelligent white people of the South were disfranchised. The negroes were ignorant and helpless, debased and depraved by generations of slavery. The great mass of them could neither read nor write. Illiterate and unfit to rule, they were the ready dupes of unscrupulous adventurers and demagogues. The carpet-bag governments that were set up in the Southern States oppressed the intelligence and

property of the South in an unjust and riotous manner. In the name of the "consent of the governed," State governments were established founded on fraud or on external force; they robbed the State treasuries, imposed exorbitant taxes, and made law and justice a mere mockery. "Government for the benefit of the governed" was entirely disregarded. Now, while the Declaration of Independence recognizes no line of race or color; while it teaches that all men should be free, and implies that all men who are *fit*, regardless of race or color, should be allowed to express their consent, or dissent, in government, it is still clearly in harmony with this declaration that the vicious and the ignorant and the incompetent should be displaced from power, and that intelligence and capacity should set up good government in place of the bad, which would have due regard to the welfare of the governed, which would be bound to administer justice, protect life and property, and give equal rights to all men under the law.

Intelligence  
and Virtue  
may Resist  
the Rule of  
the Ignorant  
and the  
Vicious.

Our fathers denied the "divine right of the king to govern wrong." In denying this they did not assert the divine right of the numerical majority to govern wrong. They asserted rather, that when *any* government became destructive of their rights, when it became corrupt and tyrannical and oppressive, such a government should be overthrown and a good government organized in its stead, having regard to the safety and happiness of the people.

"The government of the righteous father is for the benefit of his children, but it does not rest on the consent of the children; the government of the just teacher is for the benefit of his pupils, but it does not rest on the consent of his pupils; the government of God is for the benefit of man, but it does not rest on the consent of man. It ought always to be the object of those who are responsible for government, whether of the family, the

Self-  
Government  
is the Ideal,  
the Goal; not  
the Starting-  
Point.

school, or the state, to make that government so evidently disinterested, just, and beneficent that it shall win the consent of the governed, and so educative that it shall become eventually a self-government. But self-government is the end to be reached, not the starting-point to be assumed.”<sup>1</sup>

It will be evident to the student of our politics that our fathers never intended to oppose these simple truths; that their Declaration did not assert the capacity of all men for self-government, or that incapables had the right to govern. Their announcement, it is true, points towards self-government among all people as the ideal. It is, indeed, the ideal in the home, in the school, in the state. The parent and the teacher and the ruler should in one sense strive to “make themselves useless.” That is, they should so govern that the governed will become capable of self-control and self-direction, and the forcible control of teacher and parent and ruler will be no longer needed. Self-government is the goal constantly to be striven for, and until it is attained the character and happiness of a people can never be secure. Our maxim clearly implies, even though it does not assert, that

<sup>1</sup> Dr. Lyman Abbott, *The Outlook*, February 3, 1900. For further illustration and discussion of this subject see the same article p. 244. The editor says: “In Santiago, Cuba, 1898, when the American Government took command, the deaths were seven hundred a week. This was due to a universal disregard of the simplest and most self-evident sanitary laws. The people desired to live in disregard of these laws. When General Wood undertook to prescribe and enforce certain sanitary regulations he had to meet and overcome the passive resistance of the people, and would have had to resist and overcome their active resistance if they had dared to resist. Not with the consent of the governed, but, in spite of their opposition, the deaths were reduced from seven hundred a week to thirty or forty a week by a beneficent government. In such a case which right takes precedence, the right to life of the men and women and children killed before their time, or the right of an ignorant and incompetent people to determine what shall be the sanitary conditions of the city in which they live? — that is, the right of the people to have their government administered for their benefit, or the right of the people to have it conform to their will? Clearly the latter right must fall in with the former or it must fall away.”

moral obligation rests upon every nation to educate the ignorant and the poor, and to extend full citizenship as fast and as far as the safety of society will permit.<sup>1</sup>

While, then, our fathers did not assert that the responsibilities and privileges of self-government should be conferred upon all men regardless of fitness or condition, they did clearly imply that all men should have the opportunity to become fit, and they held strongly to the optimistic faith that all men may become capable of self-government.

*“When men show themselves ripe for an increase of freedom, government must remove all restrictive bonds. And the statesman must make men ripe for increased freedom by every possible means. By nothing is this ripeness and capacity for freedom so much promoted as by freedom itself.”<sup>2</sup>*

Turning from the negative aspects of this maxim, from a mere implication that it involves, we must seek to understand more clearly and fully its positive meaning.

It must be remembered that to understand this doctrine, that “governments derive their just powers from the consent of the governed,” it should be considered in connection with the opposing historic principles which our fathers had seen in conflict. Whether all men, at all times and places, were capable of self-government was not the issue upon which they were called to make a declaration. In fairness to the Fathers we must recognize the political issues over which they were in conflict.

1. English lawyers in defence of monarchy and arbitrary government had early and frequently taught that the king was the source of all legislative power. All that the people had to do with the government was to pay its taxes; the people had nothing to do with the laws except to obey them.

<sup>1</sup> See an article in *Education* for January, 1900.

<sup>2</sup> Humboldt, *Sphere and Duties of Government*.



2. Opposed to this was the principle that the will of the people was the source of the law; that any change in the law and the taxes required the consent of those whom it concerned. This, too, is a very old idea. It goes back at least to the famous maxim of Edward I. (1297), "that which toucheth all should be approved by all." That is, *the common will should be the common law*. When, therefore, a Stuart king announced that he would govern according to the common *weal*, but not according to the common *will*, he meant to assert that his will should be above the law. "*Rex est lex*," said the king. "No," said our fathers in the Commons House of Parliament, "the King is not the law; the law is King." "*Magna Charta* is such a fellow as knows no sovereign," as Pym expressed it. That is, the great law to which the body of the nation had agreed should be supreme. The will of the nation, not the will of the king, shall be the sovereign law. And our fathers in England determined that they would bring their kings into subjection to their sovereign law or they would have no king. This struggle of popular sovereignty against personal arbitrary government cost one king of England his head and another his crown, and when the struggle ended by the "Glorious Revolution of 1688" it was understood that while kings in England were still to be allowed to reign they were never again to be permitted to govern.

The People,  
not the Royal  
Will, Was  
the Source  
of the Law.

Government  
should Be  
both for the  
Common  
Weal and  
by the  
Common  
Will.

X

During this struggle the popular cause found a voice in one of the greatest Englishmen and one of the noblest advocates of liberty that has ever lived,—Milton, the poet, the philosopher, the statesman. In his defence of the English people for their resistance to the Stuart tyranny Milton said:

"The people, by experience and trial, had found the dan-

ger and inconvenience of committing arbitrary power to any. They invented laws formed or consented to by all that should confine and limit the authority of whom they chose to govern them; that thereafter no man, of whose failing they had proof, should rule over them, but law and reason, abstracted as much as might be from personal error and frailties. As the magistrate was set above the people, so the law was set above the magistrate. Since the king or magistrate holds his authority of the people, both originally and naturally for their good in the first place and not his own, then may the people, oft as they shall judge it for the best, either choose him or reject him, retain him or depose him, though no tyrant, merely by the liberty and right of freeborn men to be governed as seems to them best. If men both wise and religious, not to speak of heathen, have done justice upon tyrants what way they could soonest, how much more mild and humane then is it to give them fair and open trial; to teach lawless kings and all who so much adore them, that not mortal man, or his imperious will, but justice is the only true sovereign and supreme majesty upon earth.

“If it be said that our fathers acted without precedent in deposing and executing their king, it argues the more wisdom, virtue, and magnanimity, that they know themselves able to be a precedent to others; who perhaps, in future ages, if they prove not too degenerate, will look up with honor, and aspire towards these exemplary and matchless deeds of their ancestors, as to the highest top of their civil glory and emulation, which heretofore in the pursuance of fame and foreign dominion, spent itself vaingloriously abroad; but henceforth may learn a better fortitude to dare execute highest justice on them that shall by force of arms endeavor the oppressing and bereaving of religion and their liberty at home. That no unbridled potentate or tyrant, but to his sorrow, for the future may presume such high and irresponsible license over mankind, to havoc and turn upside down whole kingdoms of men as though they were no more in respect to his perverse will than a nation of pismires.”

Milton  
Defends the  
Right  
of the  
People to  
Govern.

Ours, then, should be a government of laws, not of men. Government by law should be paramount. And the powers of government,—of determining upon war and peace and taxation and expenditures and other great measures and policies of government,—these abided in the nation to be governed. And when George III., in violation of law, attempted to restore personal government in the Colonies, vetoing laws and revoking charters at his pleasure, our fathers in America determined to abolish the kingship itself as dangerous to the state. They knew and would therefore say, as Jefferson expressed it, that "kings are the servants not the proprietors of the people"; that these rulers, the servants of the people, should be bound to recognize and to execute the law as determined upon by the representatives of the nation. Sovereign power should abide, not in any king, or personal ruler, or favored few, but in the people themselves, in the members of the nation, in the body politic. In the political people was to be found the source of the powers to be exercised. This is one thing, at least, that our fathers meant when they declared that "all just powers of government are derived from the consent of the governed." However inadequately a maxim may state it, it is a principle so broad and clear that no one need ever mistake its vital meaning.

George III.  
Attempts  
to Restore  
Personal  
Government.

3. There was another issue immediately confronting the promoters of our Revolution.

Did a foreign parliament, a representative legislature of a people three thousand miles across the sea, have the right to control and overrule other parliaments, the representative legislatures of other peoples, of other politically organized communities in America? Our fathers, while admitting that the Colonies were parts of the British Empire, subject to Imperial regulations, asserted that in all their

A State  
Politically  
Organized  
and Capable  
Constitutes  
a People.

domestic concerns they were responsible to no government but their own; they were the subjects of no government except that to which they had given their consent through their representatives. The issue was plain. Historically, it related merely to the extent of colonial independence. Politically, it was, whether, of two political communities that had shown themselves by experience to be capable of self-government, one should be allowed to control and dominate the other. This issue had nothing to do with the rights of individuals. Confusion arises from confounding statements concerning the rights of individuals with this declaration of our fathers touching the rights of nations or of peoples. No *people*—that is, no nation, or state, or politically organized community—may be brought under the government of any other people, or ruler, without its consent.

“The law of nature and of nature’s God entitle every people to its separate and equal right of self-government and direction among the powers of earth.

One People  
should not  
have Imposed  
upon it the  
Will of  
Another.

“In 1845, Texas was such a people and it should not have been, and was not, made subject to the laws of the United States without its consent.

“In 1900, Cuba is such a people, and to annex it to the United States without its consent would violate the fundamental principle of the Republic. . . .

“In 1776, Rhode Island was such a people, not sovereign and independent in international law, but with the political and constitutional right of self-government guaranteed. Its consent to membership in the British Empire, to be subject to the commercial and international regulations of Parliament in common with the other political communities of that Empire, was implied and understood in the constitution under which it was governed. It was the unconstitutional attempt to govern and tax Rhode Island and her sister Colonies without their consent and against their interests that led to this great declaration of a people’s rights. In this declaration our fathers

were not considering the doctrine of the social compact; they were not considering the rights of minorities; they used the word 'people' as equivalent to '*nation*,' as an organized political person. They were not thinking of scattered settlers, or predatory bands roaming over vast regions they could neither own nor occupy. They were affirming the right of each of the thirteen Colonies, or of all together, to throw off the yoke of George III., and to separate itself, or themselves, from Great Britain. Our fathers were here speaking of the equal rights of nations, of their duties to each other.

"At what point do a few individuals acquire these rights of a people? The exact point where a few scattered settlements become a people, or a few nomadic tribes a nation, does not admit of precise mathematical definition. One cannot say, any more than we can say when a brook becomes a river, when a pond becomes a lake, or a lake becomes a sea."<sup>1</sup>

It will be seen with this reasonable explanation of the maxim and of the conflict that brought it forth, that Jefferson did not violate this doctrine of the consent of the governed when he bought Louisiana in 1803, nor did John Quincy Adams when he acquired Florida in 1819, nor Sumner when he made his speech for Alaska in 1867. In 1780, when the Continental Congress was seeking to induce the States to cede their claims to the Northwest Territory to the Central Government, to be held as a common possession, Congress solemnly resolved and pledged itself that this territory should "be settled and formed into distinct republican States, which shall become members of the Federal Union and have the same rights of sovereignty and freedom and independence as the other States."<sup>2</sup> From this first accession of territory until to-day, in all of our acquisitions we have recognized fully this doctrine of the consent of the

Our System  
Pledged in  
its Origin  
Self-  
Government  
to the  
States and  
Territories.

<sup>1</sup> Senator George F. Hoar, Speech in the United States Senate, April 17, 1900.—*Cong. Record*.

<sup>2</sup> *Journals of Congress*, 1780.

governed, by holding that territory so acquired should be held to be made into self-governing States. We have at times inconsistently postponed or delayed for a season the fulfilment of this principle. But it is clear that permanently refusing, or indefinitely postponing to recognize this principle of self-government within the Republic would be inconsistent with the principles of the Fathers.

4. It is not the purpose of this book to enter into the discussion of political philosophy. But if conflicting philosophies of life be applied to government, and if it be asked whether men had better be governed by coercive means or by persuasion, by the application of external force or by securing their inward consent, there can be no doubt as to which view is taught by the Declaration of Independence. There is just as little doubt as to which philosophy is founded in wisdom and experience. *All just governments will finally rest their cause on the consent of the governed.* Otherwise they will find ultimately that their foundations are insecure. This philosophy was applied to government in America long before the Declaration of Independence. When the Rev. Thomas Hooker prepared for Connecticut the "first written constitution known to history that created a government," he reflected his political democratic gospel that "the foundation of authority is laid in the free consent of the people." According to this democratic principle, government is not to be looked upon as an end in itself. Government does not exist for the sake of good government alone,—that itself, as a thing apart from the people, may be perfect and well ordered. It exists for the benefit of the people governed; that its people may grow in civilization; that they may be educated and uplifted; that they may be developed materially, mentally, morally, spiritually. It is better for a people that they participate in their own government and learn by

Government  
by Consent  
vs.

Government  
by Force.

Government  
Exists for the  
Development  
of Character.

their blunders and errors than that they should not be free to commit blunders and errors, or that they should be compelled by outside authority and compulsion to pursue the right way. Governments may otherwise rule over subjects, dependents, and slaves,—and keep them such,—but there is no other government for the development of men. Character comes by freedom and self-control, and no just government will ever be unmindful of this greatest end of its being, the development of character. Neither in politics nor in religion can salvation come in any other way. For this reason, also, we may insist upon “government by the consent of the governed.”

IV. In the fourth place our fathers asserted what we are accustomed to call the “right of revolution.” *“When any form of government becomes destructive of these ends it is the right of the people to alter or abolish it and to institute a new government, such as to them shall seem most likely to effect their safety and happiness.”*<sup>1</sup>

The Right  
of  
Revolution.

One great end of government is protection,—to secure men in their rights to life, liberty, property, happiness, and home. But if government, instead of recognizing the rights of men, denies these rights; if, instead of protecting these rights, it violates them, it is no longer a righteous government and has no right to demand obedience and subjection. It may have power to rule, but it has no right to rule. “Government ceases to be an object of obedience when it becomes an instrument of oppression.”<sup>2</sup> This is not to teach that the citizen should resort to violence and revolution against every unjust act of government. The faithful citizen, as against an unjust government, will first seek all other means of self-preservation and defence. He may submit and suffer a wrong to be done, as men usually do, rather than risk the greater evils of

Remedies  
against an  
Unjust  
Government.

<sup>1</sup> Declaration of Independence.

<sup>2</sup> Godwin, *Political Justice*.

resistance and revolution; he may appeal to the governing authority—to the king, to the nation, to public opinion—to right the wrong, as men should always do who live under a free constitution where there is the right of free discussion and free appeal; he may emigrate and refuse longer to live under what he considers an unjust government, as did many of the exiled founders of the United States. If all these means of defence fail he will be justified in seeking to overthrow a persistently unjust government. This will be his right and it may be his duty. But we, like our fathers, are to look upon revolution as a last resort:

“Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience has shown that mankind are more disposed to suffer while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government, and to provide new guards for their future security.”<sup>1</sup>

The revolutionist, however, must show (1) that his cause is just,—the government against which he struggles must be clearly an unjust government; (2) that there is no other remedy; (3) that the evils of submission are greater than those of resistance; (4) that, from the standpoint of wisdom and expediency, there are reasonable chances of success. However, a man determined upon liberty or death, who is willing to die for his cause, may be justified in facing immediate failure if this will prepare the way for subsequent success.

Conditions  
Justifying  
Revolution.

<sup>1</sup> Declaration of Independence.



Governments are often turned from an unjust course by an unsuccessful revolution. They fear the repetition of resistance. This is what Jefferson had in mind when he said that some resistance and bloodshed were necessary occasionally to keep governments in order.<sup>1</sup>

V. "*All men are created equal*,"—in their rights to life, liberty, and the pursuit of happiness.

Law and government must recognize the equal claim of everybody to these rights. This involves an equal claim to all the means of life, liberty, and happiness,—the opportunities and privileges that laws, institutions, and governments may afford.<sup>2</sup> By government one person's happiness must be counted for exactly as much as another's. "Everybody is to count for one, and nobody for more than one." Greek or Barbarian, Gentile or Jew, rich or poor, high or low, ignorant or learned, white or black,—without regard to religion, station, lineage, color, race, or previous condition of servitude,—all must be treated without discrimination, must be put upon the same footing by government and law, and all must be allowed the fullest and freest exercise and development of their natural powers. As in play it is the business of the umpire to see that the rules of the game apply to all alike, the rich boy being given no special favor, the poor boy being denied no fair chance, so in the State it is the business of government to secure "equal rights for all, special privileges for none." This elemental maxim, so simple and self-evident to all fair-minded men, has been assailed and

Equal Rights  
to Life,  
Liberty, and  
Happiness.

<sup>1</sup> The utilitarian doctrine of Bentham would make revolution more readily justifiable. "It is the right and duty of every man to enter into measures of resistance when, according to his best calculations, the probable mischiefs of resistance appear less to him than the probable mischiefs of submission."—Bentham's *Works*, vol. i., p. 287. For further discussion of this topic see "The Rights of Man," by Lyman Abbott, *The Outlook*, vol. lxviii, No. 1, pp. 42-43, May 4, 1901.

<sup>2</sup> Sir James Fitzjames Stephen's *Liberty, Equality, Fraternity*.

ridiculed as if it purported to teach what its framers never dreamed of.<sup>1</sup>

It asserts nothing whatever with reference to the physical, mental, moral, political, or spiritual qualities of men. It is one of the commonest observations of life that in all these respects men are created unequal. Men are unequal in physical stature, in mental powers, in moral emotions, in political aptitudes, in spiritual discernments. The "standard maxim of free society" which our fathers set up does not prevent the recognition of this elemental fact in life. It does not teach that government should attempt to make men equal in their natural qualities or attempt to disregard the natural inequalities in human society. It does not say that men should be made to live in society as equals or that "no law should recognize any inequality between human beings." It is clear that the

<sup>1</sup> This maxim has been assailed as if it were intended to teach the equality of men in their merits and capacities. It is a waste of energy in the opponents of democracy to be thus continually slaying the slain. To remind us repeatedly of what every one knows, that men are created unequal in respect to their mental, moral, and political qualities is nothing to the point. But it is gravely used as ground for the denial and repudiation of the fundamental principle underlying the Republic by those who are unwilling to accept the results of manhood suffrage and democracy in our national life. It may be interesting, if not profitable, to notice a few of the labored utterances of some who have been unwilling to apply the logical conclusions of the principles of the Declaration of Independence in our politics. In the slavery controversy, the anti-slavery agitators persisted in calling to their support this original foundation-principle of the Republic, much to the annoyance of a government whose practice was belying its professions. Rufus Choate, the brilliant Whig orator, who cared nothing for the rights of the slave, referred to the maxim of the Declaration as "a beautiful and glittering generality." Charles Sumner, in the Senate Chamber in 1854, made this phrase from the Declaration of Independence the basis of his powerful arraignment of slavery and the Kansas-Nebraska Bill. Senator Pettit, of Indiana, in answer to Sumner, took bolder ground than Choate: "It is not only not a self-evident truth that all men are created equal, but it is a self-evident lie. In no one instance is there any color of truth in it. I speak what is true. I speak what is the judgment of all men, if they dare say it, that neither morally, mentally, socially, nor politically does equality

doctrine of equality as a demand for a fair and equal chance in the State is unanswerable. But it is not true that the doctrine seeks to put him who uses his chance well on the same level with him who uses it ill. "Equality not only of right but equality of fact is the social goal,"—this may be according to the canons of socialism, but it is not in harmony with the spirit of American democracy,<sup>1</sup> which asserts only that no law or government should attempt to ordain, establish, and perpetuate an inequality that would not naturally and otherwise exist. Nobody should have any advantage over another save the advantage given him by his own mental, moral, or physical superiority. There should be "no legal barrier to prevent any man from acquiring the property and rights or rising to the position" to which another member of the community is entitled to attain. Accordingly, rank and privilege, political condition and

exist in any country on the earth. It cannot exist in the nature of things. God Himself has not created them equal. It is not, therefore, a truism as Jefferson put it forth, but it is false in form and false in fact. God made exceptions as to political rights. He created a priesthood. He created kings and set them up over the people. It is His recorded and plainly written will that there is no such thing as equality among men."

To this generation these seem like strange words from a disciple of democracy and a professed follower of Thomas Jefferson, uttered in our Senate halls only twenty-eight years after the sage of Monticello had been carried to his grave. Chief Justice Taney, speaking for the majority of the Supreme Court of the United States in the Dred Scott case, in 1857, referring to the Declaration of Independence, said: "It is evident that the slave race were not intended to be included in the general words used in that memorable instrument. The words would seem to embrace the whole human race, but that they were not so intended is too clear for dispute; in that case the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed they would have deserved and received universal rebuke and reprobation."

The student who may be interested in other historical utterances touching this maxim is referred to the Lincoln-Douglas Debates, 1858.

<sup>1</sup> Stephen, *Liberty, Equality, Fraternity*.

the right to rule, "cannot be hereditary, but must be open to every person who, by his talent, diligence, and good fortune is capable of attaining to them."<sup>1</sup> All qualities and all inequalities should have fair play.

This maxim of human equality, like the others to which we have referred, is to be studied in connection with what it opposes. It does not oppose or deny that reward should be according to merit, or that there are differences of capacity for serving the community, or that high function should go with high faculty, or that a man's rights in politics are strictly limited to a right of the same protection for his own interests as is given to the interests of others.<sup>2</sup> Our maxim, far from opposing these things, confronted very different ideas and practices.

There have always been interests and parties in the state striving to inculcate the doctrine that there are classes born to rule, while others are born to service and subjection; that there is a natural superiority in this ruling class, and that all other classes are naturally inferior; that some were born booted and spurred ready for riding, while others were born for saddles and bridles, ready to be ridden; that these burden-bearers, the great masses of men, must be content with the laborious and obscure condition in which they were born, and that there must not be raised in their minds false ideals and vain expectations that doors of opportunity may be open also to them and their children, leading to education, learning, position, power, and fame. These were not for the common herd but for their God-appointed rulers. They who taught this false doctrine would therefore impose artificial restraints upon the many and confer special favors and privileges upon the few. The application of this doctrine in government invariably prevents the recognition of all true merit, of all natural

✓ **Equal Rights  
will Recog-  
nize Merit.**

✓ **Is there a  
Ruling  
Class?**

<sup>1</sup> Lowell, *Essays on Government*, p. 176.

<sup>2</sup> See Morley's *Rousseau*.

and real superior ability and power for the service of the state. It was this doctrine and its consequences that confronted the young Republic in 1776. The men of '76 saw clearly that this had led to a superstitious and idolatrous reverence for royalty, to class government, to an artificial nobility with special privileges, to an aristocratic social caste claiming superior ancestral qualities with special hereditary rights, to artificial restraints and special favors, and to the denial of the rights of the people to interfere in politics. These were the ideas and practices with which our fathers were confronted. The founders of the Republic were especially impressed with the undue influence in government of royal pageantry and parade, and with the social injustice and wrongs of an hereditary, artificial aristocracy. They therefore, when they came to make a National Constitution, wrote it in their fundamental law that no title of nobility should ever be granted in America by any government, State or National.<sup>1</sup>

Evils of an  
Artificial  
Aristocracy.

Y

In opposition to the polity of a ruling class with special favors, our fathers asserted their determination to erect another polity,—a self-governed republic in which the people may choose their rulers; in which, in respect not only to the legal protection and civil rights of the State, but to its honors, offices, opportunities, and emoluments, there should be a fair field and no favor; in which every

Government  
should  
Provide a  
Fair Field  
and  
No Favor.

X

<sup>1</sup> Const., Art. I., Secs. 9 and 10.

The opinion of the founders of the American Republic, now an ingrained American conviction, as to the evils of an artificial aristocracy, has lately been expressed by a distinguished English scholar in writing on the British aristocracy: "The real evil of peers and peerages, of squires and squirarchy, lies in the substitution of a false and artificial inequality of birth and rank for the real and natural inequality of brains and faculties.—Nobody is anything by the side of a peer. The literary men, artists, thinkers, discoverers, scientists, poets, the prophets and seers of the race,—these can have but a small place in public estimation. How unimportant a great

man should be the equal of every other in his right to pursue his happiness in his own way, subject to the common weal. This is not to assert the right of every man to be put into the possession of power which is not naturally and legitimately his own; it does not mean the equal right of every man to vote, to govern, to be a ruler, a governor, or a president; but, rather, an equal right to become able and fit to be a voter, a ruler, a governor, a president,—every man to be equally and absolutely unrestrained by a single artificial barrier of government or civil society. The principle implies that this end will best be gained by manhood suffrage in a republican state.

Our fathers were also confronting social and political conditions that called for protest and opposition, and it was their purpose to announce a principle which, if reduced to practice in the state, would produce fairer and more equitable conditions.

“We may always be quite sure,” says Mr. Morley, “that no set of ideas could ever have produced this resounding effect on opinion unless they contained something which the social or spiritual condition of men whom they inflamed made true for the time and true in a very urgent sense.”<sup>1</sup> Mr. Morley here refers to the doctrine of equality announced in the Declaration of Independence. These

Our Fathers  
Found  
Unequal  
Conditions  
the Result  
of Unjust  
Laws.

writer, how important a fool with a title! Lord-worship, flunkeyism, snobbery, eat into the very heart and brain of the nation. Such a system makes the struggle of merit for recognition harder. It distracts the attention of the public from individualities and principles which might raise and widen it to individualities and principles which narrow and retard. It produces a universal reign of slavish snobbery ruinous to the manliness, the self-respect, the dignity, and the independence of the nation. The existence of a class which receives public attention on account of birth alone stands fatally in the way of the really superior class which deserves and struggles toward recognition in every direction. The artificial betterness eclipses the natural. The man-made inequality keeps from the service of humanity the God-made inequality that can best advance it.”—Grant Allen in *The Cosmopolitan*, April, 1901.

<sup>1</sup> *Essay on Rousseau*.

pages cannot describe the unjust political and social conditions and the governmental inequities of Europe in the eighteenth century, nor can they portray the outrageous wrongs inflicted upon the masses of Europe by the ruling classes,—which made government but another name for the denial of justice, but another name for tyranny and oppression. England after her Revolution of 1688 was nominally a free government, and her aristocracy was the best in Europe; but that did not mitigate the fact that there was no provision for promoting the interests of the masses of men, and that a system and monopoly of government by property was being created which gave tremendous power and wealth to an exclusive class. Mr. Murdoch, in his *History of English Reform*, reviews the legislation of England from 1688 to 1810. He recites upon his pages sixty-three statutes for the protection of a landed aristocracy, where there was a dismal void of laws for the protection of the masses of men. Laws to protect creditors and landlords, restrictive corn-laws, laws against combinations of workmen, compelling journeyman tailors to work for fixed wages, prohibiting public meetings of laborers, protecting game preserves, ejecting tenants, freeing peers from imprisonment, providing prisons for artisans and laborers, providing seven years' transportation for injuring young shrubs and plants in the night,—these are typical specimens of the legislation of a century of which it may be said that it was not in the enactment, but in the administration, in which the despotism was chiefly felt. Punishments were merciless, pitiless, and cruel. From a study of that legislation and its administration, Murdoch is led to remark that the rule of the classes was "severe, selfish, systematically suppressive."

And that the  
Benefits of  
Government  
were  
Monopolized  
by the  
Classes at  
the Expense  
of the  
Masses.

"The treatment of the people," he says, "was perhaps worse

than that under the most despotic of the monarchs, for it was tyranny under the sanction of law, and was upheld by a mixture of superior knowledge and military power. The final picture to look at was a nation great and wealthy and luxurious, and another nation poverty-stricken, ignorant and debased, both living side by side in the same island, the one the governors, the other the governed."

It was worse in France. One may not judge the social condition of an age or of a people by a single flash-light. But a word-picture of La Bruyère, often quoted about 1776, served to illustrate the *ancien régime* :

Results of  
Tyranny  
and Class  
Government  
in France.

"One sees certain ferocious animals, male and female, scattered over the country, black, livid, and burned by the sun, attached to the land which they dig and work upon with incomprehensible obstinacy. They have an articulate voice, and when they rise on their feet they exhibit a human face; and in fact they are men. At night they retire to their dens, where they live upon black bread, water, and roots. Sometimes they live on oats, they dress in skins and make bread of ferns, but they spare other men the trouble of sowing, cultivating and gathering articles of food."

These were the governed,—a peasant, toiling, tax-paying, disinherited nation. A few noble families, a hundred thousand or more, were the governors,—“by the grace of God!”

It seems that the fulness of time had come for an expression of human rights. When our fathers published their Declaration to the world it was well-nigh forgotten throughout the continent of Europe that human rights existed. Aristocracy, monarchy, absolutism, had arisen on the ruins of mediæval liberty. “The old doctrine of the Church, taught by Aquinas, that the king exists for the

Our  
Declaration  
of Human  
Rights  
Was  
Opportune.



people, was contemptuously rejected for the doctrine that the people existed for the king, whose divine right to govern wrong was a favorite theme of a servile clergy.”<sup>1</sup>

It was meet and opportune that in their great Declaration our fathers should proclaim in politics the underlying, dominant idea of their religion,—the fatherhood of God, the brotherhood of man; that they should seek to teach men a proper appreciation of their individual worth; that they are all equally the children of a common Father.

Lincoln is at once the best product and the best interpreter of the maxims of the Declaration of Independence.

“The fathers intended,” he says, “to set up a standard maxim for free society, which should be familiar to all and revered by all; constantly looked to, constantly labored for, and, even though never perfectly attained, constantly approximated. Its author meant it to be, as, thank God, it is now proving itself, a stumbling-block to all those who, in after times, might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants, and they meant, when such should reappear in this fair land and commence their avocation, they should find left for them at least one hard nut to crack.”<sup>2</sup>

Lincoln  
Explains and  
Defends  
the  
Declaration  
of Independence.

X

These principles have led to the recognition of certain rights in the common law and to certain constitutional guarantees that have been incorporated into our fundamental law—written and unwritten,—guarantees that should be applied to all peoples under the control and sovereignty of our government.

1. The equality of all citizens before just laws of their own enactment. *Equal rights for all, special privileges for none*,—the fundamental maxim of American Democracy.

2. No person shall be deprived of life, liberty, or property without due process of law.

<sup>1</sup> Lilly, *First Principles of Politics*, p. 36.

<sup>2</sup> Lincoln's speech on the Dred Scott decision, Johnston and Woodburn's *American Orations*, vol. iii., p. 164.

3. Private property shall not be taken for public use without just compensation.

4. In all criminal prosecutions the accused shall enjoy the right of a speedy and public trial, shall be informed of the nature and cause of the accusation, shall be confronted with the witnesses against him, and have compulsory process for obtaining witnesses in his favor, and the assistance of counsel for his defence.

5. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

6. No person shall be put twice in jeopardy for the same offence, or be compelled in any criminal case to be a witness against himself.

7. The right to be secure against unreasonable searches and seizures shall not be violated.

8. Neither slavery nor involuntary servitude shall exist, except as a punishment for crime.

9. No bill of attainder or *ex post facto* law shall be passed.

10. No law shall be passed abridging the freedom of speech, or of the Press, or the right of the people peaceably to assemble and petition the Government for a redress of grievances.

11. No law shall be made respecting the establishment of religion, or prohibiting the free exercise thereof,—and no person demeaning himself in an orderly manner shall ever be disturbed on account of his religious sentiments or his mode of worship.<sup>1</sup> There shall be a total separation of Church and State, for the sake alike of civil and religious freedom.

12. The diffusion of information and arraignment of all abuses at the bar of public reason,—involving the faithful education of the rising generation that they may enjoy, preserve, and transmit the conditions essential to their political-happiness.

13. Peace, commerce, and honest friendship with all nations, entangling alliances with none.<sup>2</sup>

<sup>1</sup> Ordinance of 1787.

<sup>2</sup> Jefferson's First Inaugural.

Summary of  
Principles  
Incorporated  
in the  
American  
System of  
Government.

These  
Principles  
Find Support  
in Con-  
stitutional  
Guarantees.

14. The support of the State governments in all their rights as the most competent administrators of our domestic concerns, and the surest bulwark of anti-republican tendencies.<sup>1</sup>

15. The preservation of the General Government, in its whole constitutional vigor, as the sheet-anchor of our peace at home and safety abroad.<sup>1</sup>

16. A jealous care of the right of election by the people.<sup>1</sup>

17. Absolute acquiescence in the decisions of the majority, the vital principle of republics, from which there is no appeal but to force, the vital principle of despotism.<sup>1</sup>

"These principles form the bright constellation which has gone before us and guided our steps through an age of revolution and reformation."<sup>2</sup> These are the principles of the American Democracy for which our fathers lived. They are as essential to the happiness and the prosperity of the nation in our day as in theirs. It is right that young Americans should do as their fathers did, and, for the maintenance of these principles in the life of the nation, mutually pledge to one another "their lives, their fortunes and their sacred honor."

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## CHAPTER II

### THE FEDERAL NATION

**A**RISTOTLE,<sup>1</sup> the father of political science, taught long ago what every schoolboy is supposed to know in these days, that there are three forms of government: Monarchy, Aristocracy, Democracy. Forms of Government.

*Monarchy* is the rule of an individual. This is the form of government under which the sovereignty of the state is vested in the hands of a single ruler. If the political powers of the individual are unlimited by law, if they are exercised at his own will without restraint, we have an unlimited or absolute monarchy. If the monarch's powers are limited by the law of a constitution, we have a limited, or constitutional, monarchy. Very few civilized countries now retain the form of an absolute monarchy. We speak further of this form of government under the term "Despotism."

*Aristocracy* is the rule of a minority, of a superior few.

Strictly, an Aristocracy is a government of the few best citizens exercised for the best interests of the state.<sup>2</sup>

A *Democracy* is the rule of a majority, of the masses, exercised for the common interests.

Of the three forms of government in his classification Aristotle conceived that each had its perverted form. There were three normal, or good forms and Perverted Forms. three bad, or perverted forms.

Pervert Monarchy and you have a *Despotism* or a *Tyranny*.

<sup>1</sup> Aristotle lived from 384 to 322 B.C.

<sup>2</sup> See pp. 39, 40, 49.

Pervert Aristocracy and you have an *Oligarchy*.

Pervert Democracy and you have a *Mobocracy*.<sup>1</sup>

The perverted forms, then, are:

1. A *Despotism*, or Tyranny. This is like the absolute monarchy,—a government in which the power of the

A *Despotism* monarch is not constitutionally limited. It is or Tyranny. the rule of an individual exercised by his own

will, or caprice, without control of law or without restraint by any other authority. An absolute monarchy is a despotism. The despot may be a good man and therefore his government may be a benevolent despotism. But he may also be a bad man and govern like a tyrant.

A *Tyrant* is a malevolent despot, a ruler with absolute power who oppresses the people and governs in his own interest. "A Tyrant," says Milton, quoting St. Basil, "whether by wrong or by right coming to the throne, is he who, regarding neither law nor the common good, reigns only for himself and his faction."<sup>2</sup> To the Greek, in Aristotle's day, the tyrant was one who seized upon power irregularly and lawlessly, like a usurper, without color of title. The usurping tyrant was not necessarily a bad ruler who oppressed the people. He might find his interests best subserved by mild, wise, and benevolent government, and he often provided a better government than that which he overthrew. But in our modern sense a tyrant is an absolute ruler who governs oppressively. While some absolute rulers may be wise and good, promoting good government in a capable way; and while, on the other hand, democracies may sometimes exercise

<sup>1</sup> I give here the ideas but not the terms of Aristotle. For our word "Democracy" he used the term "Polity." He used "democracy" as a perversion of "polity," as equivalent to our "mobocracy," or the rule of the unregulated mob. In Aristotle's day the democracy of the Greek cities, especially of Athens, was a degenerate rule, the rule of the incompetent, uneducated masses, moved without law, and by excitement and passion.

<sup>2</sup> Milton's *Tenure of Kings and Magistrates*.

tyranny, governing in as capricious, arbitrary, and despotic a manner as any single monarch, yet we usually think very properly that the absolute monarchy is the most inconsistent with free government. "Monarchy unaccountable is the worst form of tyranny and least of all to be endured by free-born men."<sup>1</sup> This judgment of Aristotle, expressed more than two thousand years ago, is confirmed by history and modern opinion.<sup>1</sup>

2. An *Oligarchy* is the rule of the few, exercised at their own behest. In modern conception the oligarchy may be:

The  
Oligarchy.

(1) An *Aristocracy* of landed and hereditary privileges, who use the government for their own benefit, or,

(2) A *Plutocracy*, the rule of the rich, by means of constitutions and laws giving special privileges and power to wealth and property. Under such a government the few, by means of their wealth, corrupt or force the people into subjection. This is the most vicious and corrupting of all forms of government, and under it the people are the most dependent.

The  
Plutocracy.

The distinction between Aristocracy and Oligarchy has been largely obliterated. The two terms are often used as convertible. But this distinction is worthy of notice: The Oligarchy commonly denotes the government of a wealthy minority in its own interest, and it always has a bad signification, while Aristocracy, though usually quite objectionable to the advocate of a Democracy, may have a good signification. By its original meaning and in its true sense an

Oligarchy and  
Aristocracy  
Compared.

<sup>1</sup> Aristotle's *Politics*, Bk. IV., ch. x.

"Benevolent despotism" is an expression frequently used to excuse the subjection of weaker peoples to superior force. The weakness of human nature is such that it cannot endure the temptations of irresponsible power; and, as a matter of fact, a benevolent despotism has been such a rare phenomenon in the history of the world that most reasonable men are disposed to allow a people to govern themselves badly rather than to subject them to the unrestrained power of any man, or small set of men.

Aristocracy suggests the "government of persons especially qualified by experience, training, and abilities for the work of government."<sup>1</sup> If we look merely to the quality of the government and not to the character and development of the people to be governed, no one can reasonably object to a true Aristocracy.<sup>2</sup> If there were a fair, safe way of choosing such competent persons to govern, and if guarantees could be had that they would govern in the interest of all and not chiefly in the interest of a class, it would be readily agreed that such would be the most desirable of all forms of government. The difficulty is not in agreeing that the best and most competent persons should rule, but rather in finding the safest way of placing such persons in power. It must be borne in mind that the *motive* with which one rules is a vital factor in determining the competency and virtue of a government. If power is not exercised unselfishly for the benefit of all, the government is seriously vitiated. It is the claim of Democracy that the chief end of government—the education of the people, "the greatest good to the greatest number"—is best secured by the democratic representative system.

Turning again to the Oligarchy, we notice that it is usually a plutocracy, but not necessarily so. When, before our Civil War, a slave-owner in Mississippi with one thousand slaves had as much political power at Washington as six hundred free men in Ohio, he was called an oligarch, and the government of the slave-master class in the South was called an oligarchy. A comparatively few slave-owners exercised dominant power in the State. Since the war, the white democracy in the South has triumphed over the former landed, slaveholding oligarchy. When the English barons at Runnymede forced from King John the *Magna Charta* and, in effect, became the chief power in the realm for a

The  
Oligarchy  
Illustrated.

<sup>1</sup> Sidgwick, *The Elements of Politics*, p. 582.

<sup>2</sup> See pp. 39, 40.



number of years, constraining the King to do their will, in the days before the common people came to political power in Parliament,—these barons constituted then an Oligarchy. They represented wealth partly, but more especially landed estates and political privileges.

3. *Mobocracy*, the third perverted form, is the rule of the ignorant, unenlightened mob, without restraint of law. This has been well called “the noisy prelude to anarchy.” Mobocracy marks not a form of government, but rather the absence of government. The term “ochlocracy” is applied to this form of rule by the multitude. Mob rule.

Besides the forms of government which we have mentioned,—monarchy, aristocracy, democracy, despotism, tyranny, oligarchy, plutocracy, and mobocracy, there are others recognized by political science and observed in political history which do not seem to be provided for in the various forms suggested by Aristotle’s classification.

A *Theocracy* is a form of government in which no human authority is recognized as the final, ultimate source of authority, but in which the supreme power is attributed to God, while the men who exercise rule are but the servants and vicegerents of the unseen ruler. The Mosaic State of the Jews, or of Joshua, and the Papal States of mediæval times, are cases in illustration. A Theocracy is the rule of priests, or some form of Church government. The Early Puritan State in Massachusetts, or the government of the Presbyterian Kirk in Scotland, when the Church ruled the State, are cases in point. Theocracy.

*Bureaucracy* is a government by the office-holders, each department being under the control of a chief, each chief being responsible to some central head. Under such a system few interests are left to private individuals, and the interference of the state is carried to an extreme excess. Everything is regulated by officialism. It is a

system of over-government. The officials become a class outside of and above the people. They inflict upon the people the evils of neglect where government agencies are needed; of too much interference where the people should be left alone; often, of bad management and corruption, and of domineering and autocratic conduct on the part of the officials, and of consequent humiliation to all citizens who have to come into personal contact with authority. The most complete form of Bureaucracy on a large scale is that furnished by Russia. But it is not exclusively connected with any particular form of government. All modern governments, including America, are more or less corrupted by it. It has been said that Bureaucracy is the "only form of government for which the philosopher can find no defence."<sup>1</sup>

*Militarism* should also be noticed in a study of government. Militarism is a system under which government if not exercised is at least controlled by military force and by a military class. Under this system undue prominence is given to military training and military glory, and the military class are the dominant factor in the state. Militarism cultivates pride of rank among the official class and an *esprit de corps* which leads the military to stand by the interest of their class often at the expense of justice and the public welfare. It leads generally to the assertion of arbitrary, arrogant, and domineering power over the masses. The system involves large standing armies whose burdens are heavy upon the people. It divests the freeman of all political power, and subordinates the civil interests of men to the military. It exalts authority and disregards liberty, requiring among its subjects unquestioning obedience. It looks upon the citizen as a soldier, present or prospective, and it tends to cultivate among its subjects false and flattering obeisance, subserviency, and servility. As a system

<sup>1</sup> See Lalor's *Cyclopædia of Political Science*.

of government, Militarism is the most hateful to self-respecting freemen. It cannot be said to mark the absence of all law, for it has its martial law, its martial courts, and its orderly modes of procedure. It is most efficient in preserving order and enforcing authority and, when well and honestly officered and administered, in providing good and efficient administration. But it may be said to mark the absence of all civil law and constitutionalism. "In the midst of arms laws are silent." Military rule is absolute and autocratic; it is organized to suppress resistance and is the farthest removed from anything like self-government. It is a system which will not be tolerated by enlightened, self-governing men, except under stern necessity for the public defence. Militarism is especially distasteful to a democracy, where equality of rights and standing is inculcated. Under military rule, artificial and sometimes false standards of honor are erected; socially, a great gulf is fixed between the private soldier and the commissioned officer, and the plain citizen is despised. A free people will always subordinate the military to the civil arm. If in times of war and public danger the military is permitted to suppress the civil power, the free citizen will remember that it is the suppression of civil liberty for the sake of the public defence, and it will be permitted only with the feeling that the people may afford to "part with their liberty for a while in order to preserve it forever." "Military rule over a civilized people actuated by democratic conviction is always objectionable."<sup>1</sup>

<sup>1</sup> Gen. Davis, in instituting civil government in Porto Rico.

The following will indicate how Militarism is regarded by an intelligent writer in a military republic: "Militarism causes economic ruin, intellectual decay, moral feebleness, political anarchy. It is apt to result in a general, or universal, obligatory military service of three or five years. The sons of the rich, through different pretexts, manage to escape with a year or less; but the sons of the farmers, of the workmen, and the whole laboring class of the nation remain three years in the army. . . . The

There should be explained, also, the terms "republican," "federal," "national," and "consolidated," which we often hear applied to governments. We may best explain these terms in connection with the study of our own form of government.

It is customary to say that the United States of America is a Republic,—that we have a republican form of government. When the Constitutional Convention of 1787 submitted the new plan of government to the people of the States, Madison said that if it should be found to depart from the republican character its advocates would be obliged to abandon it as no longer defensible.<sup>1</sup> Madison spoke with authority, and it is evident that the framers of our Constitution intended to establish a republican form of government. The Constitution says:

"The United States shall guarantee to every State in this Union a republican form of government."

But our Constitution does not define a republican form of government, and there have been great disputes on that subject. But the general understanding is clear, that a republican form of government is one in which the people's representatives make the laws and their agents administer them, and in which the people also, directly or indirectly, choose the executive agents. It does not follow that the whole body of the people, or even the whole body of adult male competent persons, should be admitted to political privileges. The law in the State

barracks life is one of idleness, moral inertia, and low debauch. The industrial workman no longer knows his trade; the young farmer, after loafing so long in the wine shops of garrison towns, no longer desires to return to the soil, and agriculture is abandoned."—Urbain Gohier, author of *L'Armée contre la Nation*, in *New York Independent*, on "The Danger of Militarism," Jan. 25, 1900.

<sup>1</sup> *Federalist*, No. 39, p. 232, Lodge Ed.

will determine that.<sup>1</sup> Many nations have been called republics whose forms of government did not fulfil our conception of this term. Holland was called a republic, but no particle of its supreme authority was derived from the people. Rome was called a republic, but Rome, under the republic, was organized on a military basis, and the power of the people was very limited. Venice was called a republic, but in Venice absolute power was exercised over the great body of the people by a small body of hereditary nobles. Poland was called a republic, but the government of Poland was a bad mixture of aristocracy and monarchy. Athens was called a republic, but in Athens there were ten slaves to one freeman: the ruling citizenship was a mere handful. Thus we may recognize, from the history of political science, several kinds of republics:

An *Oligarchic Republic*, like Venice. This was a republic only in name; only a handful of nobles exercised their oppressions under an honorable title.

Varieties of  
Republics.

A *Military Republic*, like Rome. This was organized on a military plan for military purposes, that the whole power of the State might be used in quick, united action in conquest or defence.

A *Federal Republic*, like Switzerland or the United States, made up of minor states, also republics, united for common purposes.

A *Centralized or National Republic*, like France, with all powers of government exercised by the Central Government. The United States is, as we shall see, partly a Federal and partly a National Republic.

<sup>1</sup> Cooley, *Constitutional Law*, p. 195; *Luther vs. Borden* (1848); 7 Howard 42 (Rhode Island case), *Federalist*, Nos. 21, 43; Boyd, *Cases on Constitutional Law*, pp. 647-652; Cooley, *Principles of Constitutional Law*, pp. 194-198; Boutwell, *The Constitution of the United States at the End of the First Century*, pp. 343-350; *Texas vs. White*, Supreme Court Decision, 7 Wall 700.

A *Democratic Republic*, like Switzerland or the United States, in which the sovereign power is derived from and is exercised, either directly or indirectly, by the great body of the people.

Madison, in *The Federalist*, after noticing various misapplications of the term, defines a republic, in substance, as follows:

“ A Republic is a government which derives all its powers, directly or indirectly, from the great body of the people. It is administered by persons holding their offices either during pleasure or for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of the society, not from a small proportion or favored class. It is sufficient for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified.”<sup>1</sup>

Briefly, then, we may say, that a republic is a state in which the governmental power is exercised by the people through their elected representatives. This power, while it is derived from the people, must be exercised under a system of legal and constitutional restraints. The republic implies that the political and social impulses of the people are to be restrained by constitutional forms through which, only, the rule of the people may be made effective. Republican government may virtually exist under monarchical forms, as in England. There the government is essentially republican while nominally monarchical. But in the United States the republican form is specifically guaranteed by the Constitution.

The republican theory demands that every part of the people shall duly influence the acts of the state. The government shall not be in the hands of a class, or of a

<sup>1</sup> *The Federalist*, No. 39.

combination of classes. If a class can do what it will in the state it will often do less than justice toward other classes. The republic requires, for instance, that the state shall not act in such a way as to bring the nation into a war for the benefit of its aristocracy, or of its commercial class, while the war must be paid for with the money and lives of all the people. It will therefore stand, not only for equality of civil rights but for an equal distribution of political power.<sup>1</sup>

It will be seen, from what has been said, that ours is not an aristocratic republic, nor an oligarchic republic, but, rather, a *democratic republic*,—a state in which the mass of the people are represented in the government. For this reason our nation is sometimes called a democracy.

A *Democracy* is the form of the state in which the sovereign power is exercised by the people themselves. A  
Democracy.

In a *Pure*, or an *Absolute Democracy*, the government is by the simple direct action of the people, without other control than such as their own temperance or moral restraint may impose at the time of their assembly. It will be understood that a pure democracy cannot exist over any considerable extent of territory. Only in little city republics, like those of ancient Greece or mediæval Italy, could all the citizens come together to make the laws. Although we may imagine the whole body of the people in a very little state making the laws it is very difficult, if not impossible, to imagine them as executing the laws. They must have their agents to do this.

The  
Democracy  
may Be either  
Absolute or  
Representa-  
tive.

x

“The whole people cannot operate the government any more than the whole of twenty people in an omnibus can drive the horses. Some one must drive as some one must govern.”<sup>2</sup>

<sup>1</sup> Hosmer, *The People and Politics*.

<sup>2</sup> *Ibid.*, p. 239.

The representative idea being introduced we find the *Pure Democracy* shading into

The *Representative Democracy*. Under this form the people, besides making the laws, elect executive and judicial agents to carry out the laws. This is a government in which the actual governing power is but one step removed from the people. The laws are ordered by and the governing agents are appointed by, and are directly responsible to, the people. In a government under the *Initiative* and *Referendum*, by which the people may secure a vote upon a proposal, and by their vote may issue a mandate to the law-forming body to incorporate the approved measure into law, and under which the enacting, executive, and judicial officers are appointed by, and are directly responsible to, the people,—such a government would be a Representative Democracy. Ours is sometimes called a *Constitutional Democracy*. This may be defined as a government in which the power of the people is exercised through representatives under constitutional restraints; a state in which the people have prescribed for themselves in a constitution the ways and means by which the people shall govern. The difference between the Constitutional Democracy and the Democratic Republic cannot be clearly defined. Broadly speaking, the distinction lies in the extent and directness of popular power. In proportion as the people rule directly, in that proportion do we tend from the Republican to the Democratic form. The election of the President, of United States Senators, and of Supreme Court Judges by direct vote of the people would, of course, make our Government more democratic.

Looking at this subject historically, it is clearly evident that the American Republic has grown much more democratic than it was in 1787. It was not the intention of the framers of the Constitution to form a Representative Democracy. The power was not to be easily and immedi-



ately exercised at the popular behest. The final exercise of power was, in most cases, remote from the people. The government created by the Constitution was a republic, with many and strong constitutional safeguards against the excesses of democracy. The framers of our Constitution felt that the evils from which they were then suffering had "their origin in the turbulence and follies of democracy, that the people would be the dupes of demagogues, and should have very little to do directly with the government."<sup>1</sup> They therefore proposed to "refine popular power by successive filtrations," as Madison expressed it. They would let popular power filter up and thereby become purer and safer at the top. The people might choose a State Legislature; the State Legislature might choose the National House of Representatives; the House might choose the Senate; the Senate might elect the President, and the President might appoint the Supreme Court, and the latter body, with its important functions of interpreting and applying the law, would be considered safely enough removed from the people. As Mr. Bryce says:

Our Fathers  
Made a Constitutional  
Republic,  
not a Representative  
Democracy.

X

"The spirit of 1787 was conservative and its constitution was the least democratic of democracies."<sup>2</sup>

Popular power—democratic government—was not "filtered" so much as the illustration above would indicate; but the principle of the Constitutional Republic with its limitations on popular government is clearly involved in the Constitution,—as seen in the election of the President, the election of the Senate and the appointment of the Supreme Court. In the Republic, as distinguished from the Democracy, not only are the people constitu-

<sup>1</sup> Randolph, Sherman, and Gerry in the Constitutional Convention of 1787.

<sup>2</sup> Bryce, *American Commonwealth*, vol. i., p. 307.

tionally checked in choosing officers, but they are also so checked in the making of laws. It is an error to suppose that ours is a government of the mere numerical majority. The majority can govern in America only as its power is exercised through constitutional channels, and it often requires a largely preponderant majority before the majority can overcome constitutional checks.

Our Republic is not a centralized or consolidated republic. France is a *Centralized* or consolidated Republic, but ours is a *Federal Republic*. A *Centralized Republic* is one in which all governmental powers are centralized in one sovereign legislature, with all its people thrown into one mass to be governed in all their concerns from a common centre. For convenience in administration the people in a large centralized republic may be divided into departments or provinces or counties, but these subdivisions are subject to the sovereign will exercised at the common centre, and they exist for administrative purposes only; that is, the divisions exist in order that the policies and the law determined upon by the Central Government may be the more conveniently and certainly carried out.

The *Federal Republic* is one which is formed by a union of republics; it is a combination of republican States. This form allows a large and well-defined degree of independence and local self-government to the States, or divisions, forming the Federal State.<sup>1</sup>

“It is hardly necessary to enlarge on the merits of *local government*. It stimulates and keeps alive political life in a way that central government alone can never do; it trains independent politicians for the service of the state; it prevents the establishment of that dead level of administrative uniformity which is the ideal of a central bureaucracy; and it re-

<sup>1</sup> For the merits and demerits of the Federal system, the benefits and evils of local self-government, see Bryce, *American Commonwealth*, vol. i., chaps. xxix., xxx.

lieves the central government of an immense amount of routine duty, which the latter could not perform satisfactorily." <sup>1</sup>

"Legislation from a distance, applied to masses of men does not know how to tolerate variety." <sup>2</sup>

The Federal Republic, and therefore the United States, is a *composite State*,—a composite of the Confederation, on the one hand, and the Centralized or purely National Republic, upon the other. While ours is a *national* government, it is not entirely national; and while it is *federal*, it is not entirely federal. It is a complex, federal-national Republic. In order to understand this complex combination, it will be helpful, first, to understand clearly the differences between the government of a *Confederation* and the government of a *Centralized State*. Then, as a composite between these two, we may be able to understand more easily the nature of the *Federation*.

The United States is a Complex, Federal-National Republic.

When smaller political bodies, or communities, are united to form a larger political community, the relation of the smaller to the larger is under one of the three following forms:

1. The *Confederation*, or the *League*. 2. The *Centralized Nation*. 3. The *Federal Nation*, or the *Federation*.

The distinction between these forms is made clear in a notable passage from Mr. Bryce:

"The *Confederation*, or the *League*, is the form of government in which a number of political bodies, be they monarchies or republics, are bound together so as to constitute for certain purposes, and especially purposes of common defence, a single body. The members of such a body, or league, are not individual men, but communities, and will, therefore, vanish as soon as the communities which compose it separate themselves from one another.

<sup>1</sup> Edward Jenks, *History of Politics*, p. 155.

<sup>2</sup> Maccunn, *Ethics of Citizenship*, p. 163.

Moreover, it deals with and acts upon the communities only. With the individual citizen it has nothing to do, no right of taxing him, or judging him, or making laws for him; for in all these matters it is to his own community that the allegiance of the citizen is due."

Such is the Confederation. It is a mere union of States, without authority over individuals. If such a government, or central agency for the States, needs money or troops, it calls upon the States for the supplies; it makes requisitions, or requests the States to furnish what is needed, without authority to compel the grant. The States may respond in their own way or refuse to respond. Sovereign power,—final, supreme authority—resides in the States. Refusal to comply with a requisition may be a violation of the compact, or agreement, entered into by the States in their adoption of the articles of confederation. But if a State refuses to fulfil its obligation there is no constitutional remedy. If the other States should combine to make war upon the refusing State to coerce it into the performance of its obligation, that act would be an acknowledgment that the League is dissolved, and it would be in the nature of a conquest and would not come within the scope of a constitutional confederation. Even though the power of coercion were granted to, let us say, two thirds of the States, its exercise would result in a change of the form of government.

"But in a National Government," continues Mr. Bryce, "which is made up of smaller communities, these smaller communities are mere subdivisions of the Nation. They have been created, or they exist, for administrative purposes only. Such powers as they possess are powers delegated by the Nation and can be overridden by its will. The Nation acts directly by its own officers, not merely on the communities, but upon every single citizen; and the Nation, because it is independent of these communities, would continue to exist were they all to disappear."

The  
National  
Government.

Clearly this is not a union. It is a state made up of component parts, but these parts were not previously independent communities, or, if so, they have ceased to be. It is merely a simple, unified, centralized nation, as France, or Belgium, or Brazil is one.

"Now," Mr. Bryce goes on to say, "the American Republic corresponds to neither of these two forms, but may be said to stand between them. Its Central, or National, Government is not a mere league, for it does not wholly depend upon component communities which we call the States. It is made up of commonwealths, but it is itself a commonwealth, because it claims directly the obedience of every citizen and acts immediately upon him through its courts and executive officers. Still less are its minor communities, the States, mere subdivisions of the Union, mere creatures of the National Government, like the counties of England or the departments of France. They have over their citizens an authority which is their own, and not delegated by the Central Government. They have not been called into being by that government. They existed before it; they could exist without it. . . . The Union is more than an aggregation of States, and the States are more than parts of the Union."<sup>1</sup>

The  
Federal  
Nation.

This is an excellent description of the Federal Republic, or the Federation. Both the Confederation and the Federation designate a union of distinct States. But the union that forms a Federation creates a new sovereign State. It is a *Bundesstaat*, a state made by a union, not merely a *Staatenbund*, a union made by states; it is a banded state, not merely a band of states. In the Federation the "several units are legally and constitutionally united, and sovereignty—the power of ultimately determining its own legal competence—resides in the federal body."<sup>2</sup> This sovereignty is irrevocably deposited with

<sup>1</sup> *American Commonwealth*, vol. 1., p. 16, *et seq.*

<sup>2</sup> Willoughby, *The Theory of the State*, p. 253.

the Federal State, to be exercised through the Federal Government. The States may retain a limited independence, constitutionally defined rights, and a well-defined autonomy in internal affairs, but the Federal State not only *exercises* sovereign powers, it *possesses* them of its own right; it has received not only the *delegation* of such powers but the *surrender* of them.<sup>1</sup> Ours is a *Federal* not a *Confederate* Republic.<sup>2</sup>

<sup>1</sup> In contradistinction to Calhoun's position. See speech on the Force Bill, Feb. 15, 1833. Johnston's *American Orations*, vol. 1., p. 312.

<sup>2</sup> "A composite, or Federal State, and a *system of confederated States* are broadly distinguished as follows: *In a Federal State*, the several united societies are one independent society, or are severally subject to one sovereign body; which through its minister, the general government, and through its members and ministers, the several united governments, is habitually and generally obeyed in each of the united societies and also in the larger society arising from the union of all. *In a Confederate State*, the several compacted societies are not one society, and are not subject to a common sovereign; or each of the several societies is an independent and political society, and each of their several governments is properly sovereign or supreme. Though the aggregate of the several governments was the framer of the confederate compact, and may subsequently pass resolutions concerning the entire confederacy, neither the terms of that compact, nor such subsequent resolutions, are enforced in any of the societies by the authority of that aggregate body. To each of the confederated governments these terms and resolutions are merely articles of agreement which it spontaneously adopts; and they owe their legal effect, in its own political society, to laws and other commands which it makes or fashions upon them, and which, of its own authority, it addresses to its own subjects. In short, a system of Confederated States (a Confederation) is not essentially different from a number of independent governments connected by an ordinary alliance. And where independent governments are connected by an ordinary alliance, none of the allied governments is subject to the allied governments considered as an aggregate body; though each of the allied governments adopts the terms of the alliance, and commonly enforces those terms, by laws and commands of its own in its own independent community. Indeed a system of Confederated States and a number of independent governments connected by an ordinary alliance cannot be distinguished precisely through general or abstract expressions. The former is intended to be permanent, while the latter is intended to be temporary; while the ends or purposes embraced by the compact are commonly more numerous and more complicated than in the

But the term "*Federal* government," as we have here described it, has not always been used in this sense. We have defined it as opposed to *Confederate*.

But, in 1787, it was used in contradistinction to *National*. It then had a different meaning.

It meant then what we now mean by *Confederate*. Our Government from 1781 to 1787

Federal and  
National  
Aspects  
of our Gov-  
ernment Dis-  
tinguished.

was a confederate government, but it was always called *Federal*. It was a government of States, made by the States, operating on the States, or through the States, and it could be, as it was, dissolved by the States. Its funds were supplied by the States; its officers were appointed by the States, paid by the States, and could be recalled by the States. All this was then understood to indicate the essence of *federation*. Those in the Federal Convention of 1787, men like Paterson, Martin, Yates, and Dickinson, who wished to continue that kind of a government, claimed to be Federalists, friends of a true federal government; while those in the Convention, like Randolph, Madison, Hamilton, Wilson, King, and others who wished to form a new kind of government, one that would draw its powers directly from the whole body of the people of America and operate directly upon the people without the intervention of the States,—these men were called by their opponents *Nationalists*. At that time there were no Federal States in the world as now known to political science, and as we have defined the federal nation in the preceding paragraph. The so-called Federal States of that day were, to speak accurately, Confederate States. The Federal State is of recent growth, a product really of the nineteenth century; while the confederate form of united states has now almost dropped out of use among case of the temporary alliance."—Austin's *Province of Jurisprudence Determined*, ed. 1861, pp. 223-224.

For further discussion of the distinction between the Federal and the Confederated State, see Professor Willoughby's able and scholarly work, *The Nature of the State*, pp. 253-258.

civilized peoples. Therefore when we use the term "federal" in the following passage we use it as opposed to "national," to distinguish between the federal and the national aspects of our Government; we use it in the sense of 1787, as Madison used it, and as it was understood in that day.

Mr. Madison, in No. 39 of the *Federalist*, has given political science one of the best expositions of the complex, dual character of our Constitution. In order to understand more clearly how our Government is a combination of the federal-national form we should notice some of its aspects as discussed by Mr. Madison.

In explaining our Constitution to the people of America, when he was pleading for its adoption by them,

Madison pointed out that the new government in its origin was *federal*, not *national*. What did he mean by that? He meant that this government was to be founded on the assent and ratification of the people of America, but this assent and ratification were to be given by the people, not as individuals, composing one entire nation, but as composing the distinct and independent States to which they respectively belonged. It was to be the assent and ratification of the several States, derived from the supreme authority in each State. The act, therefore, establishing the Constitution was federal, not national. It was an act of the States. Both in the Convention which made the Constitution and in its ratification the people voted as States.<sup>1</sup>

<sup>1</sup> It is an error to state, as has been done by some writers, on the hypothesis that a purely national state was created by the American people in 1789, that the State conventions which adopted the Federal Constitution were organs of the Federal Nation. This is purely theoretical and entirely unhistorical. Such an idea never occurred to political writers until within late years,—until political philosophy came to make a definition of the modern Federal State and to prove that the American Republic was in its origin of that kind. See Burgess's *Political Science and Constitutional Law*; Willoughby's *Nature of the State*.



The new government could result only from the unanimous assent of all the States which became parties to it. This is the meaning of *federal*, as here used. When the people act as States in union the act is a federal act; when they act as individuals directly through the nation it is a national act. The people of the United States *en masse*, as one nation, never had anything to do with, they were never called upon to express themselves in, ordaining and establishing this Constitution. Our Government in its origin is federal. It was adopted by States. Not by State legislatures, or State governments, but by the people directly, though organized in States and acting as States.

But if in its *origin* the United States Government is seen to be purely federal, in the *sources* from which it derives its power it will be seen to be partly federal and partly national.

The House of Representatives derives its powers from the people of America directly. That is, it is constituted by direct representation of the people and is appointed to act for them by direct delegation of power. The people are represented there on the same principle and in the same proportion, usually, as they are represented in the legislature of one of the States. So far the Government is *national* not *federal*.

But the Senate is based on the States as political and co-equal societies. The States are represented on the principle of equality in the Senate. In this respect the Government is *federal*, not *national*.

The executive power is derived from a compound source. The immediate election of the President is made by the States in their political characters. But the allotment of votes to the States considers them partly as distinct and co-equal societies, partly as unequal members of the same society. To begin with, in allotting electoral

2. In the  
Sources of its  
Powers our  
Government  
is Complex,  
partly  
Federal,  
partly  
National.

p

votes, two votes are given to each State. Statehood is recognized to this extent, and so far the source of power in electing the President is *federal*. But in a presidential election the States are also considered as unequal members of the same society. That is, votes in the electoral college are allotted to them, after two are allotted to each, in proportion to population. So far the source of executive power is *national*, not *federal*. The eventual election, that is, the election in the last resort, is to be made by that branch of the National Legislature which is national in its character; but in this particular act the voting is to be by States; the members do not vote as individual members of the House, but they are thrown into the form of State delegations from so many distinct and equal bodies politic. Each delegation, or State, has one vote, Rhode Island or Delaware counting for as much as Illinois or Ohio. The act of final election, though performed by a national body, is purely federal. The election is *federal*—made by States—on a *national* basis of representation. Thus it will be seen that in the source of executive power the Government is mixed in character, being partly federal and partly national.

But how about the operation of the Government? A federal government operates on the political bodies composing the confederation.<sup>1</sup> A national government operates on the individual citizens composing the nation, in their individual capacities. By this criterion our Government is *national*, not *federal*. It operates on and controls the individual directly.<sup>2</sup> It was upon this quality of its nature and existence that the National Government, in 1861,

<sup>1</sup> It may be well to remind the reader that *federal* is here used, not as defined by modern political science, but as understood in 1787,—in the sense of our term confederate.

<sup>2</sup> The trial of controversies to which the States may be parties is an exception to this.

proceeded in the war for the Union. In 1861, the question was not whether the National Government could coerce the States. It proceeded to coerce, not the States, but individuals in insurrection. It used its direct powers, derived from the people, to be used over people in resistance. The war for the Union was a war of the nation against those resisting national authority; it was not a war between the States. The people of some of the States were using their State organizations to resist the national supremacy; but the national authority disregarded the States and proceeded against the individuals directly. The authority of the National Government over the citizens of every State is immediate and direct. The co-operation of the State government is not required for the execution or operation of national powers. The nation operates of its own right over its own citizens. The Constitution expects certain services of the States. The States are expected to choose Senators, Representatives, and Presidential Electors; to arm and equip its militia, to maintain a republican form of government, but the National Government would continue to perform its functions even though the States refused or neglected to do these things. The National Government does not operate through States.<sup>1</sup> It does not call on the States for funds, nor issue orders to the States in order to have its laws and commands executed, nor does it require the State to submit its laws to national authority for inspection and approval. To the extent to which the National Government has a right to exercise authority over individuals it operates as a national, not as a federal government.

The War for  
the Union  
Was a  
Coercion of  
Individuals,  
not of States.

<sup>1</sup> Of course if the people of all the States should refuse to continue the Government by refusing to elect representatives to carry it on, the National Government would be suspended. But the law of the Constitution is as stated above.

While we may say that our Government is *national* in the *operation* of its powers, what shall we say when we look to the *extent* of its powers? To what extent is our Government the government of a national State with truly sovereign powers? Around this question has raged the great controversy in our history.

4. In the Extent of its Powers the Government is partly National, partly Federal.

The idea of a National Government without limit to its powers involves not only an authority over the individual citizens, but an indefinite supremacy over all persons and things, so far as they are objects of lawful government. Among a people consolidated into one nation this supremacy is completely vested in the National Legislature. We have no such National Government as that. Among communities united for particular purposes, defined by the Constitution of the Union, this supremacy is vested partly in the general and partly in the local legislatures. In the consolidated nation all local authorities are subordinate to the supreme, and may be controlled, directed, or abolished by it at pleasure. In our Federal State, or Union, the local authorities form distinct and independent portions of the supremacy, no more subject within their respective spheres to the general authority than the general authority is subject to them within its own sphere. It is the Constitution that defines these respective spheres, and limits, or assigns, the powers to each.

In this aspect our Government cannot be said to be national. That is, it is not fully national, like the government of a unified, consolidated nation. To an extent, it can exercise governmental powers like any nation; to an extent it cannot exercise such powers, but as to these powers it is purely federal. Its governmental scope, or jurisdiction, extends to certain enumerated objects only, and leaves to the several States a residuary and inviolable mass of powers over all other objects.

To understand this more clearly and fully, distinction should be made between sovereignty and supremacy, as these terms are frequently used in discussing our Government. In certain respects supremacy is allowed by the sovereign power to the National Government; in certain other respects this supremacy is allowed to the State governments. *Sovereignty* was not retained in the States, but a mass of powers were allotted by the sovereign national people to be exercised by the States, and while this allotment continues the States are supreme as to these powers. The *sovereign power* resides in the people of the United States organized into States. This sovereignty was exercised, or came into being, in 1787, through the then Confederate Congress and the State conventions, in the adoption of the Constitution. It may be exercised again in amending this Constitution, or in making a new one, either through a national convention, properly called, representing all the States, or through the Federal Congress and the State legislatures, as prescribed by the Constitution. In the exercise of this sovereignty in 1787-88, the people delegated certain powers to the National Government and retained certain powers in the States. Neither the National Government nor the State government is sovereign in any particular. The nation only is sovereign; but it is the nation that is sovereign, not the National Government. The National Government and the States, through the State governments, exercise particular powers of sovereignty, permitted by the sovereign power. *Sovereignty* is unlimited power over the members of the State and all associations of its members. It cannot be divided. It is impossible to have two sovereign authorities within the State. But the sovereign authority may divide the exercise of sovereign powers. It may delegate certain supreme powers to one government and certain other powers to another. Our governments, both State and

Distinction  
between  
Sovereignty  
and  
Supremacy.

National, are limited, not sovereign, and there is a relation between them. But the power of the people of the United States to alter these governments to suit themselves, to redistribute the powers that they now possess, is unlimited and absolute; that is, it is sovereign. The organs through which this sovereignty is expressed, or through which this sovereign power is exercised, are the State and National governments, or it might be the National Convention.

Historically, then, the sovereign people of the United States, acting through the States, created a Constitution. By the Constitution they erected, or recognized, two governments, Federal and State. To both of these two governments they gave supreme powers, the one government to be supreme in certain respects, the other in others. Hamilton explained it in this way:

“That two supreme powers cannot act together is false. They are inconsistent only when they are aimed at each other, or at one indivisible object. The laws of the United States are supreme as to all their proper constitutional objects; the laws of the State are supreme in the same way. These supreme laws may act on different objects without clashing; or they may operate on different parts of the same common object with perfect harmony. The meaning of the maxim that there cannot be two supremes is simply this,—two powers cannot be supreme over each other.”<sup>1</sup>

Webster speaks to the same effect. In replying to Hayne upon the respective powers of the State and Federal governments, Webster says:

“We are all agents of the same supreme power, the people. The General Government and the State government derive their authority from the same source. Neither can in relation to the other be called primary, though one is definite and re-

<sup>1</sup> Hamilton on the Constitution in the New York Convention, June 27, 1788. See Johnston's *Representative American Orations*, vol. i., p. 50.

stricted and the other is general and residuary. The National Government possesses those powers which it can be shown the people have conferred upon it, and no more. All the rest belong to the State governments, or to the people themselves."

To determine the extent of the national jurisdiction was the purpose of the long historic controversy between the advocates of national power and the advocates of States' rights. One cannot fully understand the nature of our form of government unless he knows, in a measure, the character of that contention and its outcome. The contention involved two questions:

1. What was the nature of the Union under the Constitution as to the relation between the States and the Nation?

If that question was not answered by the Constitution itself, in the first place, it has been answered by our history since. It is now at rest. It is answered in the description we have given of our country as a *federal nation*. The Union is no longer to be looked upon as a league. It is not a compact between the States, dissoluble at pleasure. It is a nation, one and indivisible. But this does not imply the loss of distinct existence and the right of self-government by the States. "The preservation of the States and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution in all its provisions looks to an indestructible union of indestructible States."<sup>1</sup>

2. Accompanying this question was a second,—What were the limits to the powers of each government?

Two historic views were set forth in answer to this question. It was properly a matter for judicial constitutional construction. But it became the basis of division

<sup>1</sup> Supreme Court in the case of *Texas vs. White*, 7 Wall 700. See also p. 323, Bryce, vol. i.

between contending parties in their conflicting views of the Constitution. Each party emphasized one side of the truth, and it is our purpose to notice to what extent our history and our accepted constitutional interpretation have reconciled the two. One view was set forth by Jefferson. This great leader taught, quite rightly, that our Government is a government of limited powers, and that those limits are determined, not by the National Government itself, but by the Constitution. He said:

"I consider the foundations of the Constitution as laid on this ground. All powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States or to the people.<sup>1</sup> To take a single step beyond the boundaries thus specifically drawn around the powers of Congress is to take possession of a boundless field of power no longer susceptible of any definition. Congress was not given power to provide for the general welfare, but only to lay taxes for that purpose. To consider the 'general welfare' phrase as giving a distinct and independent power to do any act they please which might be for the good of the Union would render all the preceding and subsequent enumeration of powers completely useless. It would reduce the whole instrument to a single phrase, that of instituting a Congress with power to do whatever would be, in its judgment, for the good of the United States."<sup>2</sup>

"The government created by the Constitution was not made the exclusive, or final, judge of the extent of the powers delegated to itself; since that would have made its discretion and not the Constitution, the measure of its powers. The construction applied by the General Government to that part of the Constitution which delegates to Congress a power to make all laws that shall be necessary and proper for carrying into execution the powers<sup>3</sup> vested by the Constitution in the Gov-

<sup>1</sup> Tenth Amendment to the Constitution.

<sup>2</sup> Jefferson's Opinion on the Constitutionality of the First United States Bank, *Writings of Jefferson*, Ford's ed., vol. v., p. 284.

<sup>3</sup> This is the well-known expression of the "sweeping clause" of the



ernment of the United States, or any department thereof, goes to the destruction of all the limits prescribed to their power by the Constitution. *Words meant to be subsidiary to the execution of limited powers ought not to be so construed as to give unlimited powers, nor a part so to be taken as to destroy the whole residue of the instrument.*"<sup>1</sup>

Jefferson held that the very fact that some powers were specifically granted must be taken to mean that those not so specified were withheld, according to the old maxim: "As exceptions strengthen the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated."

Such was Jefferson's famous statement of the doctrine of the strict construction of the Constitution. It will be seen from the outcome, as we notice the conclusions of our history and the interpretations of the Supreme Court, that the doctrine is sound and unquestionable to the extent that it teaches that our National Government is limited and not sovereign and plenary in its powers, and that the Constitution and not its own discretion defines those limits.

But it was Hamilton's office to teach, by his doctrine of broad, or liberal, construction, that our Government is a government of *implied powers*; that our Constitution may be so construed as to give broader, larger, and more numerous powers than Jefferson would permit. In the same controversy that brought out the expression from Jefferson, Hamilton said:

Hamilton  
and Broad  
Construction:  
Our Govern-  
ment is one  
of Implied  
Powers.

"There are express and implied powers, and the latter are as effectually delegated as the former. There is also another Constitution,—supposed to *sweep* in all other necessary powers not delegated to Congress. It closes (is "subsidiary to") the list of powers conferred on Congress. Art. I., Sec. 8, of the Constitution.

<sup>1</sup> Jefferson's Kentucky Resolutions, Arts. I. and VII.

class of powers which may be called *resulting powers*—resulting from the whole mass of the power of the government and from the nature of political society rather than as a consequence of any especially enumerated power. For example, in the conquest of territory the United States would have sovereign jurisdiction of it. Thus a power not specifically enumerated may result from, or be implied in, some or all of the powers vested in the National Government. The only question, then, is this: Has the *means* to be employed any natural relation to any of the acknowledged, lawful *ends* of the government? The test of constitutionality lies in the end sought. Is the *end* included in the expressed powers? If it is so included the means requisite and fairly applicable are constitutional. It is an axiom inherent in the idea of government that a power vested includes by the force of the term the means requisite and fairly applicable to the end sought.

“The powers of the Federal Government are sovereign. This includes by force of the term the right to employ all means not precluded by the restrictions of the Constitution, or not immoral, or contrary to the essential ends of the political society. . . . A Corporation may not be created by the United States for superintending the police of the city of Philadelphia, because the United States are not authorized to regulate the police of that city. But one may be erected in relation to the collection of taxes, or to the trade between the States, or with the Indian tribes; because it is the province of the Federal Government to regulate those objects, and because it is incident to a general sovereign, or legislative, power of regulating a thing, to employ all the means which relate to its regulation to the best and greatest advantage. . . . The *degree* in which a measure is necessary can never be a *test* of the *legal right* to adopt it; that must be a matter of opinion, and can only be a test of *expediency*. The *relation* between the *measure* and the *end*,—between the *nature* of the *means* employed toward the execution of a power and the object of that power,—must be the criterion, not the more or less necessity or utility.”<sup>1</sup>

<sup>1</sup> Hamilton's *Works*, vol. iii., pp. 181-189, Lodge ed.

These two constitutional doctrines, the one, emphasized by Jefferson, that our Government is one of limited powers, the other, emphasized by Hamilton, that it is a government of implied powers, are recognized and combined by one of the notable decisions of the Supreme Court rendered by the great Chief Justice Marshall:

"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising and will probably continue to arise as long as our system shall exist. . . . The powers of the Government are limited and its powers are not to be transcended. But the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in a manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but are consistent with the letter and spirit of the Constitution, are constitutional."<sup>1</sup>

Marshall  
Recognises  
both Limited  
Powers  
and  
Broad  
Construction.

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The doctrine of *implied powers* is now well established and needs no further illustration or explanation. The growth of power to the General Government by implication and interpretation is a well-known and distinguished part of our national history. But the limitations on power imposed by the National Constitution deserves further notice, since these limitations aid us the better to understand the relation between the States and the Federal Government.

It is quite a common error to suppose that the general

<sup>1</sup> Marshall in the case of *McCulloch vs. Maryland*, 1819.

restrictions of the United States Constitution apply to the several States, and that by these general restrictions

and prohibitions the States are restrained in their governmental acts. The United States

Constitution says, for instance, that "no person shall be held to answer for a capital crime un-

less on indictment of a grand jury"; that "in suits at common law the right of trial by jury

shall be preserved"; that no one shall "be subject for the same offence to be twice put in jeopardy of life or limb." But it is not always understood that

these and other provisions of the "Bill of Rights" apply only to the General Government; they do not limit or

restrain the States. If a State, through its own constitution, should abolish the right of trial by jury, or deny

the right of its citizens to claim just compensation for private property condemned for public uses, neither the

National Constitution, nor the national law by the interpretation of its courts, would be brought to bear to

prevent. Unless the States are specifically mentioned, the limitations imposed by the

United States Constitution are imposed on the National Government only, not on the States.

The United States were forbidden to deprive any person of any of the privileges guaranteed in the "Bill of

Rights." The States might, *in respect to their own inhabitants, infringe them all.* If the States do not infringe

upon expressed provisions of the Constitution especially addressed to them, or upon those implied in the whole

scope of that instrument and in the grants of power to the General Government, they might regulate their own

internal economy as seemed best to themselves. This is brought out in a notable decision by Chief Justice

Marshall:

"The Constitution was ordained and established by the

people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted for their situation, and best calculated to promote their interest. The powers to be conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by this instrument."<sup>1</sup>

**Barron vs.  
Baltimore.  
The Supreme  
Court  
Decides  
that General  
Limitations  
do not Limit  
the States.**

X

In this case Barron was pleading before the Court that the Fifth Amendment to the United States Constitution, forbidding the taking of private property for public use without compensation, ought to be so construed as to restrain the legislative power of a State as well as that of the United States; but the Court denied his plea.

This is a part of our Constitution so commonly misunderstood and of such importance that it needs to be further amplified. The Constitution of the United States was adopted in 1787 and 1788 to form a better government than that of the old Confederation. The government created by it was the National Government, not the State governments. The States were already provided with constitutions and governments of their own. These constitutions generally contained provisions securing to their people the rights guaranteed in the amendments subsequently incorporated in the United States Constitution, and known as the "Bill of Rights." These amendments were incorporated in the United States Constitution as a guarantee that the new government would not infringe upon these rights that had already been

<sup>1</sup> Barron vs. Baltimore, 1833, 7 Peters, 243.

guaranteed in the written constitutions of the respective States. It was to the States the people looked for these guarantees. But they wished to make assurance doubly sure, and they therefore also limited the new National Government in these directions. The new Constitution was a written instrument intended to serve as a fundamental law for the new government which it created; and therefore it was to that government, and to it alone (unless otherwise expressly stated), that all of its provisions and restrictions apply. Its limitations, therefore, rest only on the Federal Government. For example, "No bill of attainder or *ex post facto* law shall be passed."<sup>1</sup> This prohibits the General Government, but not the States, from passing such enactments. To prohibit the States from passing such measures it was necessary that the Constitution should say in addition, as was done in the next section: "No State shall pass a bill of attainder or *ex post facto* law."<sup>2</sup> The rule of construction is thus summarized by one of the greatest of American jurists:

"To state the rule of construction concisely it is this: The restrictions imposed upon government by the Constitution and its amendments are to be understood as restrictions upon the government of the Union except where the States are expressly mentioned."<sup>3</sup>

This Federal System, a Nation made by a union of States, provides for a distribution of powers between the two governments, State and National. The constitutional powers to be exercised in America are classified according to this distribution. The classification is as follows:

<sup>1</sup> Constitution, Art. I., Sec. 9, Cl. 3.

<sup>2</sup> *Ibid.*, Sec. 10, Cl. 1.

<sup>3</sup> Hon. Thomas M. Cooley, *Constitutional Law*, p. 19.

1. Powers vested in the National Government alone.
2. Powers vested in the State governments alone.
3. Concurrent powers, or those that may be exercised by either State or National Government. **Classification of Powers.**
4. Powers forbidden to the National Government.
5. Powers forbidden to the States.
6. Powers forbidden to both governments.

1. The first class of powers are general in their character, such as touch the interest of all the people. In early days the Central Government was looked upon merely as a "department for foreign affairs." The States were to be left free to regulate all their domestic concerns for themselves. Those things that the whole people can attend to for all the parts better than any part can attend to for itself are turned over to the National Government. These are: (a) foreign relations, (b) the regulation of commerce with foreign countries and among the States, (c) the making of peace and war, and the general defence for which an army and navy may be needed, (d) coining money and the regulation of the currency and of weights and measures, (e) the management of the post-office, (f) the regulations concerning naturalization and bankruptcy, (g) the governmental machinery for the departments charged with these purposes.

**1. Powers  
Conferred on  
the Central  
Government.**

2. The powers vested in the States alone are not named in the Constitution. It is not necessary nor possible that they should be; because, as we have seen in considering the limitations on State and National power imposed by the Constitution, the States may do all things from which they are not prohibited by that instrument. In conferring the general powers upon the National Government the people reserved all other powers to the States,—barring those specifically excepted. All unmentioned governmental powers rest where they rested before the adoption of the

**2. Powers  
Vested in  
the States  
Alone.**

Constitution, that is, in the States. The powers of the States are original and inherent. Those of the National

**The Powers  
of the State  
Are Original  
and Inherent;  
those of the  
National  
Government  
are Dele-  
gated and  
Enumerated.**

Government are delegated,—that is, they are enumerated in and defined by the Constitution creating the Union. The powers of the State belonged to it before it entered the Union. It is clear that this is historically true of the original thirteen States; and since this is a Union of equal States, then from the constitutional point of view this must also be held to be true of the

later States, even though, as an historical fact, as Territories before becoming States of the Union they exercised no powers of government except what were conferred upon them by the National Government. The powers of the State, then, embrace all that “residuary mass of powers” not recited in the Constitution either as belonging to the National Government or as prohibited to the States. If there is a question as to whether a State can exercise a power, the presumption is that it can, unless it can be shown to have been taken away by the Constitution. This preserves local self-government to the people.

3. *Concurrent Powers* are those that may be exercised by both the State and the National Government. It does

not follow because a power has been conferred upon the National Government that it may not

also be exercised by the State governments. There are powers that from their very nature both governments must be left to exercise, such as the power of taxation, the promotion of learning, and the encouragement of arts and manufactures. On such subjects two legislative wills may act at the same time over the same persons. The exercise of such powers as are essential to the maintenance of a government, such as the taxing power and the direct control of the citizen through the operation of the courts, must be left to either government. Certain limitations on the taxing power are imposed on both governments.



Neither government can tax exports from any State.<sup>1</sup> And since "the power to tax involves the power to destroy,"<sup>2</sup> no State, except by the consent of Congress, may tax any corporation or other agency created for Federal purposes, or any act done under Federal authority; nor shall the National Government tax any State, its agency, or its property. Neither government, by the use of the taxing power, shall be able to destroy, or prevent the effective operation of, the other. In cases of conflict of authority as to objects of taxation the national authority must prevail and its claims must be satisfied first, though in taxation it is not expected that one power will exclude the operation of the other.

There are other powers that are concurrent, not from their nature, but because they are specified as such in the Constitution,—subjects like bankruptcy or matters relating to the election of Senators and Representatives. But if Congress acts on these subjects the State laws relating to them must give way. "It is not the mere existence of a national power, but its exercise, which is incompatible with the exercise of the same power by the States."<sup>3</sup> The Constitution says: "Congress shall have power to establish uniform laws on the subject of bankruptcies."<sup>4</sup> Congress is permitted but is not commanded by the Constitution to exercise such power. If it does not exercise the power, any State may pass its own bankrupt laws; but if Congress chooses to exercise this power its act excludes all others; that is, all State acts of bankruptcy fall. State legislation takes effect only in the absence of Federal legislation.

#### 4. The fourth class of powers, those forbidden to the

<sup>1</sup> Constitution, Art. I., Secs. 9 and 10.

<sup>2</sup> Supreme Court, *McCulloch vs. Maryland*, 1819.

<sup>3</sup> Cooley, *Constitutional Law*, p. 35; *Sturgis vs. Crowninshield*.

<sup>4</sup> Art. I., Sec. 8, Cl. 4.

The Exercise  
of a National  
Power  
Excludes  
Legislation  
by the States.

X

National Government, are, for the most part, included in the first ten amendments.<sup>1</sup> The chief of these, not also forbidden to the States, are as follows:

X  
4. Prohibi-  
tions on  
the National  
Government.

(a) The writ of *habeas corpus* shall not be suspended except when the public safety may require it.

(b) No capitation or direct tax shall be laid, except in proportion to the population.

(c) In commercial regulations no preference shall be given to the ports of one State over those of another.

(d) No money shall be drawn from the public treasury but in consequence of appropriations made by law.

(e) No law shall be passed establishing or prohibiting any religion, or abridging freedom of speech or of the press, or of public meeting or of bearing arms.

(f) No religious test shall be required as a qualification for any office under the United States.

(g) No person shall be tried for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in a military or naval service; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall any one be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

(h) In all criminal prosecutions the right of trial by jury in the district wherein the crime shall have been committed shall not be denied the accused, who shall be informed of the nature and cause of the accusation, be confronted by the witnesses against him, and have compulsory process for obtaining witnesses in his favor, and have assistance of counsel for his defence.

(i) In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-

<sup>1</sup> See also Art. I., Sec. 9, of the Constitution.

examined in any court of the United States than according to the rules of the common law.

(j) Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

5. The fifth class of powers, those prohibited to the States, may be briefly recited<sup>1</sup>:

5. Powers  
Prohibited to  
the States.

(a) No State shall make any treaty or alliance; nor coin money; nor make anything but gold and silver a legal tender; nor pass a law impairing the obligation of contracts.

(b) No State shall, without the consent of Congress, lay duties on exports or imports; nor keep troops or ships of war in time of peace; nor engage in war unless actually invaded or in imminent danger.

(c) No State shall deny credit to the records and judicial proceedings of the other States; nor deny the privileges and immunities of its citizens to the citizens of other States; nor establish any but a republican form of government; nor maintain slavery; nor abridge the privilege of any citizen of the United States or deny to him the right of voting on account of race, color, or previous condition of servitude; nor deprive any person of life, liberty, or property without due process of law, nor deny to any person the equal protection of the law.

6. There are also certain powers that are prohibited both to the State and the National Government. Neither can grant a title of nobility, nor pass an *ex post facto* law or a bill of attainder; nor deprive any person of life, liberty, or property without due process of law.<sup>2</sup> The people have forbidden any governmental agency in America the right to do these things. As Mr. Bryce expresses it, "There are things in America which there exists no organized and permanent

6. Powers  
Prohibited  
both to the  
State and  
the Nation.

<sup>1</sup> See the Constitution, Art. I., Sec. 10.

<sup>2</sup> Fourteenth Amendment. This was adopted since the decision in the case of *Barron vs. Baltimore*, referred to on p. 79. The student should refer in this connection to the passages on pp. 356 *et seq.*

authority capable of legally doing; not a State, because it is expressly forbidden; not the National Government, because it either has not received the competence or has been expressly forbidden."<sup>1</sup>

But this passage from Mr. Bryce, and the conception that our Government is one of enumerated powers only, and that it can do only what it has "received competence" to do by a grant of powers that are expressed or implied in an enumerated list,—this description does not fully explain the character of our National Government. It is true that so far as express prohibitions are concerned, the people have reserved certain powers to themselves to be exercised only through subsequent grants of power by amendments. But it has been found impracticable, if not impossible, to confine the National Government to a list of recited and implied powers. The *written* Constitution so intends and provides. But as a matter

of fact the National Government is more than a government of delegated powers: it has assumed power to do other than those things that have been enumerated. There is a sense in which the National Government must be regarded as one of original and inherent powers,—powers that come to it from the nature of government, from necessity and usage in government; and also from the law of the *unwritten* constitution. Hamilton called these

*resulting powers*. *Implied powers* are drawn from specific and express grants of power. Congress has power to coin money and to regulate commerce; therefore Congress may establish a mint, build lighthouses, and improve harbors. These powers are implied necessarily in those that are granted. But *resulting powers* come from the very character of the National Government itself and from the functions it has to perform,—from the whole scope and nature of the Consti-

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The National  
Government  
Has Original  
and Inherent  
Powers for  
National  
Purposes.

Resulting  
Powers.

<sup>1</sup> Bryce, vol. i., p. 315.

tution. The National Government cannot be, under the Constitution, a government of unlimited powers; but every power essential to the life and processes of a *nation* must be conceded to it. It must be allowed to perform every national governmental function which any national sovereign government can perform, from which it is not restrained by the restrictions of the Constitution.<sup>1</sup>

"For it would be impossible to construct a government no branch of which can exercise a necessary power unless it has been granted. . . . Whatever the written Constitution may provide on this question, the fact is that the United States Government does exercise powers which are not delegated to it by the written Constitution. The attempt [to interpret constitutional law as strictly limiting the National Government to enumerated powers] has resulted in the assumption by Congress of powers which were not expressly delegated nor fairly implied."<sup>2</sup>

The extent to which such necessary and natural powers may be exercised by the National Government has been, as is well known, a subject of great discussion. The assumption of such powers has been resisted as unconstitutional usurpation; but, as a matter of fact, larger and larger powers of this kind have been established by usage, from time to time, and have come to be accepted as legal. From the point of view of constitutional government such employment of original and inherent powers is to be looked upon as the substitution of an unwritten for a written constitution, or as an advance, so far, in the development of our unwritten constitution by interpretation and usage.<sup>3</sup>

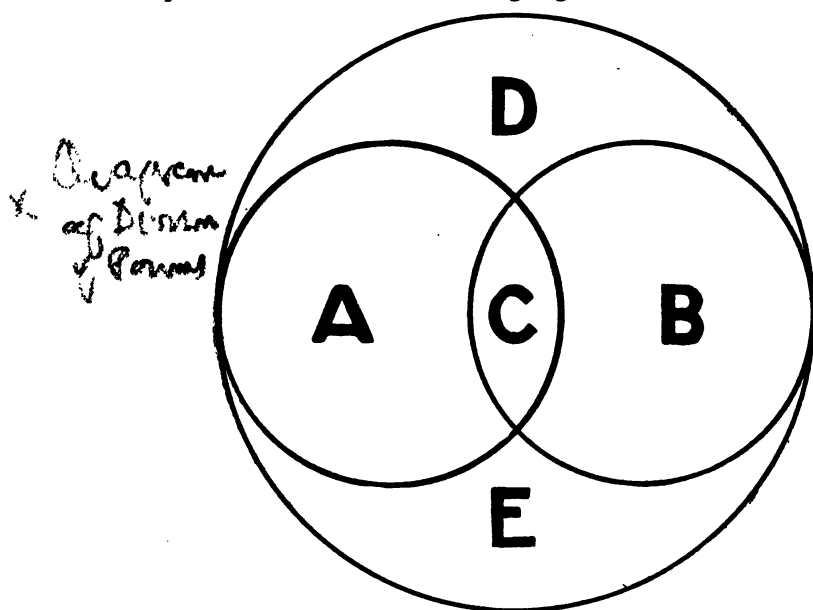
<sup>1</sup> Even the expressed prohibitions of the Constitution do not restrain the National Government from the exercise of sovereign national powers, according to the late Insular decision. But it may be questioned whether this is accepted as permanent constitutional law.

<sup>2</sup> Tiedeman, *The Unwritten Constitution of the United States*, p. 139.

<sup>3</sup> Professor Tiedeman mentions, as cases illustrating the employment of

This distribution of powers and the limitations on the National Government will enable us to understand how, in comparing the British Parliament with the American

original rather than delegated powers, the Louisiana Purchase and the Legal Tender laws. These laws were not delegated nor fairly implied. They were exercised and allowed because the National Government was a government, and, as such, it was in possession of sovereign and original powers touching these subjects. The late decision in the Insular Cases is a still more forcible illustration. (See p. 385.) The question here raised, as to the exercise by the National Government of original and unenumerated powers, is made clear in the following diagram from Professor Tiedeman :



The whole circle represents the sum total of governmental powers ; circle A, powers delegated to the United States ; circle B, powers reserved to the States ; segment C, concurrent powers ; segment D, powers prohibited to both governments ; segment E, powers prohibited to the States, but neither prohibited nor delegated to the United States.

The question for discussion is whether the U. S. Government may exercise a power which is prohibited to the States, but which is neither prohibited nor delegated to the General Government, that is, the powers represented in E.—Tiedeman, *The Unwritten Constitution*, p. 138.

Congress, the government of Parliament may be said to be *sovereign* and *constituent* while the government of Congress is not. In contradistinction, the government of Congress is *limited* and *representative*. In law, Parliament is the nation. Its powers represent the sum total of governmental powers. There is no political power above it competent to restrain or overrule it; there is no sphere or field of government in which it may not operate, no act of government which it may not perform. Congressmen *represent* the people; but Parliament *is* the people. Congress is the agent; Parliament is the principal. Congressmen have constituents separate from and above them; but, in law, Parliament holds within itself the constituent parts of the nation. Since the constituent elements of the nation are in Parliament, whatever the nation can do in its sovereign capacity the Parliament can do. It is not restrained by a constitution, because its acts make up the Constitution, and the courts accept and act in harmony with any act passed by Parliament.<sup>1</sup> "Parliament is the British nation for every purpose. Congress is the American nation only for the purpose of exercising the powers delegated in the Constitution."<sup>2</sup> For example, in 1716, the English Parliament, which had been elected for a term of three years, passed the Septennial Act, by which the members prolonged their own terms to seven years. This act was denounced as "unconstitutional"; but it was unconstitutional only in the sense of being unusual and unprecedented,—such a thing had never been done before. The Septennial Act, however, was perfectly valid; it was accepted by the courts and it has ever since held as law. Whatever Parliament does is constitutional.

But imagine members of Congress, having been elected for the constitutional term of two years, attempting by their own act, a law of Congress, to extend their term to

<sup>1</sup> See p. 95. <sup>2</sup> C. F. Randolph, *Law and Policy of Annexation*, p. 45.

five or seven years! Such an act, of course, would transcend the powers of Congress; it would be immediately declared illegal by the courts, and any attempt by Congress or its agents to execute such a measure would be regarded as usurpation and revolution. The body in America that would be competent to do such a thing, that would be sovereign and constituent and, therefore, competent to act for America as Parliament acts for Great Britain, would be the Constitutional Convention of all the States and the ratifying conventions of three fourths of the States. This body would be the *nation*, the body competent to make and amend constitutions.

On the other hand, Congress is limited by the Constitution and by the division of powers for which the Constitution provides. Congress can do only what the Constitution allows and act only in the sphere assigned to it. It is limited by the powers and prerogatives of the President, and it may be restrained, also, by the decisions of the Supreme Court. It is representative in the sense that it must act as an agent, not as a principal; and as an agent it is responsible to its constituents, the sovereign, who have given to Congress definite written instructions as to what it may do.

Our Government is one of a Written Constitution. This distinction between the government of Parliament and that of Congress comes largely from the fact that ours is a government of a *written constitution*.

The constitution of a state or nation is its fundamental, organic law which determines its form of government and the underlying principles on which its government shall be conducted. If the principles, rules, and laws determining the organic form of the state are embodied in a single written document, the government is one of a written constitution. But if these rules and principles are made up from statutes, decisions, and precedents that have been passed and rendered from time to time, and if



the fundamental law is found in usage and custom based on precedents and practices of the past, the nation is then said to have an *unwritten constitution*. The United States has a *written* constitution,—a document of definite length, prescribing the rules and methods for conducting the government. England has an *unwritten* constitution,—a set of proceedings and long-standing laws that it has been customary to go by. An important distinction is that in a country with an unwritten constitution the constitution can be changed by the ordinary legislature, just as any law can be amended or changed; while in a country with a written constitution the constitution is placed above and out of the reach of the legislature, being subject to change only by the same superior authority that created the constitution.

An unwritten constitution is called *flexible*; it is "one that is capable at any time of being bent, turned, expanded, or contracted" at the will of the supreme legislature. It is hard to change only as a nation's habits are hard to change. In a government under an unwritten constitution the National Legislature is absolute; it can do what it will. But it feels bound to conduct the government on principles that are well known and of record, according to laws that are written and old, and according to habits that are deep-rooted and revered. These are pretty fair safeguards against usurpation, despotism, and tyranny; and therefore the government of such a legislature, while absolute in law, is constitutional in practice.

A written constitution is called *inflexible*, or *rigid*. That is, it is one that cannot be easily turned or changed. It stands in unbending resistance against the efforts of a temporary majority in the legislature to override or disregard its provisions. Its terms are fixed, and they can be changed only by the same slow and difficult process by which the constitution was made.

So far as our Constitution is looked upon as purely

written, to that extent it is inflexible. But even the written Constitution of America has not proven entirely inflexible and rigid. Any constitution that will not bend must break. A constitution must change and expand with the expansion and growth of the country for which it was made; it must be able to accommodate itself, by its flexible, expansive qualities, to changed conditions, or it will be laid aside. There is constant temptation under a very rigid constitution to violate its provisions or to disregard them by very loose construction. The American Constitution contains, not statutory matter, but broad, fundamental principles of government, stated in general terms; and therefore it has found room to expand, not only by the written process of amendment, but also by the processes of interpretation, construction, and usage.<sup>1</sup>

While our Constitution is generally spoken of as written, it is not entirely written. Usage has given us, in considerable measure, an *unwritten constitution*. There are many instances of constitutional understandings in America, practices and precedents having all the force of law, that have been established by usage. It is the law of the unwritten constitution that

Presidential electors have no right to exercise their discretion in voting for presidential candidates; they must vote for their party nominee.

A President may not be elected for a third term.

A President may remove his appointees without asking the consent of the Senate.

The House and Senate both conduct their business by the committee system, the committees in the Senate being elective, while in the House they are appointed by the Speaker. This has no other basis than the usage and standing order of each House.

The Senate will not refuse to confirm Cabinet appointments.

<sup>1</sup> See the chapter on the Judiciary, p. 339.

A member of Congress must reside in the district from which he is chosen.

The party caucus determines the course of party action, and a resulting obligation rests on the individual members who participate in the caucus to obey the decision of the caucus meeting. This relates to our party constitution. It may be said that all our party law regulating the constitution of our party machinery and proceedings of party conventions is *unwritten law*. It consists of nothing but precedents and customs; and the last legislature of the party, that is, the delegate convention, may change the party constitution at will.<sup>1</sup>

Thus we conclude that while our National Government is one of a written constitution, this has not made it inflexibly rigid, nor prevented it from expanding by construction and usage; that while, it is limited in its functions, it may exercise original and inherent powers, as any sovereign nation may, in matters essentially national; that, while it is a democratic republic, its democracy is limited by constitutional safeguards; and that, while it is national, it is also federal. *It is a complex, federal-national, democratic republic, not consolidated, but federated, with local self-government in the States under the protection of a powerful Nation.* Thus, representative government has been enabled to operate over an extended and Imperial area, and "democracy and empire" are preserved together.

<sup>1</sup> While it is the purpose of this chapter to study the structure of our Government apart from political parties, it will be seen, of course, that in our unwritten political constitution our political parties make up a very important part.

## CHAPTER III

### THE PRESIDENCY

**X** UNDER the old Confederation the United States had no President. There was a presiding officer of "Congress," but he was merely a moderator of a meeting, and was in no sense an executive head of a government. The President was created by the Constitution of 1787.

The Executive under the Old Confederation.

When the Convention met which formed the new Constitution it was not an easy matter to come to a conclusion as to what kind of an Executive the new government should have. It was readily agreed that there should be three departments,—Legislative, Executive, and Judicial; but to cast these into form and to determine their powers, duties, and limitations and their relations to one another was not an easy task.

**7** The original "Randolph Plan," supposed to contain the backbone and skeleton of the Constitution, proposed that a National Executive be instituted to be chosen by the National Legislature. It was thought by some, notably by Roger Sherman of Connecticut, that the Executive should be nothing more than an institution for carrying the will of the legislature into effect; that it should be appointed by, and be accountable to, the legislature. The legislature was to be "the depository of the supreme will of the society"; to make the Executive independent of the legislature was of the very

The Virginia Plan.

**1** Sherman's Idea of Executive Dependence.

essence of tyranny. The legislature was the best judge of the business which ought to be committed to the Executive department, and, consequently, of the number necessary to do this business. Therefore Sherman would not have the number of the Executive department fixed, but he would leave the legislature free to appoint one or more as experience might dictate; he would have the Executive entirely dependent upon the legislature. By this theory the legislature is the representative head of the body politic; it thinks and wills and decides. The Executive is but the hands and arms and feet to execute the will and decision arrived at.

These views as to the relation between the executive and the legislative branches of government serve to suggest the difference between the Parliamentary and the Presidential system of government,—between the English system and the American. When governments are classified according to the relation of the legislature to the Executive, they are either *Parliamentary* or *Presidential*. A *Presidential Government*, like ours, is the form in which the Executive is independent of the legislature. Our President is independent of Congress both in tenure and prerogative. Congress does not elect the President (except in an emergency), nor can it shorten his term, nor take away his constitutional powers, nor in any way remove him, except by impeachment for high crimes and misdemeanors. He was not made entirely independent of the legislature, but as nearly so as could be,—as nearly as would be safe for freedom and good government.

Parliamentary and Presidential Government Compared.

*Parliamentary Government* is the form in which the Executive, is elected by and is dependent upon the legislature, in which the legislature has "complete control of the administration of law."<sup>1</sup> Under this form the legislature is the supreme determining will in the State, and

<sup>1</sup> Burgess, p. 13.

the Executive is the agency to carry out that will. The legislature decides, the Executive acts. Under this form of government the legislature creates the Executive and terminates it at pleasure, and the Executive can undertake no course and exercise no prerogative not approved by the legislature. Of course such control of the Executive by the legislature implies either that the legislature consists of only one house, or that the houses are not co-ordinate,—that one is dominant in power and control over the other. For instance, in England under Parliamentary government, the Commons is the chief power in the state, the dominant branch of the legislature, and as such it is the source of the Executive. The

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Theory of  
Cabinet  
Government.

Ministry, or Cabinet, which is the executive branch of the Government—usually called “the Government,”—is created by the party majority in the Commons; this Executive is responsible for its acts and policies to the Commons. If at any time a vote is passed in the Commons adverse to the Government or the Cabinet, the Ministry must either resign or dissolve Parliament and appeal to the country. If, in the election which follows, the people send up a Commons still adverse to the Ministry, the Ministry must resign and the King must call the leader of the opposition party to form a new Cabinet. Refusal on the part of the Ministry to resign and to permit the formation of a new Cabinet in harmony with the majority in the Commons, or refusal of the King so to reorganize the Ministry according to the mandate of the election would be equivalent to usurpation and revolution and might cause violent upheaval and resistance. The Commons, or the dominant branch of the legislature must control the Executive policy and acts of the Government. This is called Parliamentary government. It is also called *Cabinet* or *Ministerial government*, in contradistinction to Presidential government.

Such is the theory of Cabinet government. But the practice of the system does not always correspond to the theory. It is to be remembered that Parliamentary government is a growth. It was never designed, or created, or established at any one time. It is a product of evolution. It grew from age to age. It changed from one generation to another, and has never been quite the same in its practical operation in any two periods of its history. In earlier times it was a privy council to the king, subject chiefly to his will,—a kind of royal cabal. Later, under the Hanoverian kings, it became an agency of the Whig oligarchy—the rule of a few powerful families in the realm who controlled enough boroughs to enable them to control the Commons. George III. attempted to make it an instrument through which the king should again actually govern. George III. did not attempt to defy the Commons or to govern without it, as Charles I. had done; but by the corruption of boroughs, by means of his pensioners and placemen, he sought to control the Commons. The “king’s friends” were so numerous in Parliament that no party Minister could hold his place, or maintain a government, contrary to the king’s will. But in spite of this last effort of a king to govern as well as to reign, Parliamentary government was maintained against the royal prerogative, and the Cabinet became, as it is now in theory, the executive agent of the Commons. The Cabinet originates and proposes measures; the Commons is supposed to deliberate on these, to discuss them, and to decide on the proposals, accepting or rejecting as the sense of the Commons is pleased. But in practice to-day the Cabinet system presents another aspect. It is not the Commons which actually determines on measures, so much as the Cabinet itself. It is rare that a “Government” bill is discussed. The department that has it in charge gener-

Cabinet  
Government  
in Practice.

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George III.'s  
Personal  
Government.

ally forces the measure through by applying the party majority to its support. Criticism is silenced by the knowledge that the measure is the proposal of the Ministry *whom the majority were sent there to support*. A private member cannot obtain an opportunity for the discussion of a bill unless the Government wishes to have it so. Financial debates on the budget are becoming more and more formal every year, the Treasury department fixing the sum to be spent, and spending it, while the House concurs in practical silence. "In all departments of political life the Cabinet governs, and not the House of Commons, which, instead of governing, confines itself to appointing, dismissing, and, on occasion, silently influencing the Cabinet."<sup>1</sup> This has been called a gradual and "unconscious revolution." The talking Parliament had talked too much, until legislative business had become congested, and deliberation and debate came to be regarded as an intolerable interruption to the serious business of the state, until now we have "Parliament practically controlled, guided and, in a sense, superseded by what was once its executive committee."<sup>2</sup>

While practice has made this accretion of power to the Cabinet a natural process, it is still true that the Cabinet is responsible, and it may be dismissed at any time if it goes contrary to the prevailing opinion of the nation as represented in the Commons. The Cabinet is still merely the agency through which the democratic power of the nation is exercised.

Now if the views expressed by Roger Sherman in the Constitutional Convention had prevailed, we should have had the English system of the responsible Ministry. Sherman was thinking of the Executive not as one person, but as several,—as an executive committee to carry

<sup>1</sup> See an article on "Cabinet Government," London *Spectator*, April 2, 1898.

<sup>2</sup> *Spectator*, April 2, 1898.



out the governmental business determined upon,—a committee appointed by Congress and dischargeable by Congress. This would have made Congress the responsible supreme power in the nation. It would have closely united the executive and the legislative power and responsibility in one body. It would have concentrated the powers of government instead of separating them, and under such provision, no doubt, something like the English Cabinet system would have grown up in America. It would have tended toward a more direct democracy in the Government,—producing a government more quickly responding to popular behests. Instead of this, the framers of our Constitution established the separation of the departments of government. Each department, the Executive and the Legislative, has its source in the people; each is elected by the people without the intervention of the other; each has its rights, duties, privileges, and prerogatives, assigned by the Constitution, and for the performance of these the two departments are answerable, not to each other, but to the people directly, and each is supreme under the Constitution and the sovereign power of the people in its own defined sphere.

**Sherman's  
Proposal of  
the Cabinet  
System for  
America.**

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**Separation  
of the De-  
partments.**

The Executive is also independent of the Judiciary. The Supreme Court cannot control the President in his executive policies and conduct. The extent to which the President is bound by the decisions of the Supreme Court has been repeatedly discussed, but the conclusion is that he is as independent from control by the courts as from the legislature. This will be seen from a number of precedents and authorities. In the celebrated case of *Marbury vs. Madison* (1803), President Jefferson refused to be controlled in his legal duty as defined by the Supreme Court. Marbury was one of the “mid-

**The Presi-  
dent is  
Independent  
of the  
Judiciary.**

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**Marbury vs.  
Madison.**

night judges" appointed by the Federalist President, John Adams, on the last night of his presidential term. Madison was Jefferson's Secretary of State. When Jefferson came into office March 4, 1801, on the desk in the office of his Secretary of State was found Marbury's commission, appointing him Justice of the Peace in the District of Columbia. The President had appointed him; the Senate had confirmed him, and the commission had been in due form signed and sealed. Jefferson directed Madison not to deliver the commission. Marbury, in order to secure the commission and properly qualify for office, applied to the Supreme Court for a writ of *mandamus* to compel Madison to deliver the commission. The Court decided, through Chief Justice Marshall, that Marbury was entitled to his commission and that it was clearly Madison's duty to deliver it, and that while a lower court, if applied to, might issue a *mandamus* to compel its delivery as a purely ministerial act, the Supreme Court had no authority to do so. The President disregarded the decision and his legal duty as defined by it, and he claimed that the Judiciary had no power to control the Executive. Jefferson asserted that nothing in the Constitution had given to the Judiciary a right to decide for the Executive more than to the Executive to decide for the Judiciary.

“ Both magistracies are equally independent in the spheres of action assigned to them. The Constitution meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional and what are not, not only for themselves in their own sphere of action but for the Executive and the Legislative also in their spheres, would make the Judiciary a despotic branch.”<sup>1</sup>

<sup>1</sup> Letter to Mrs. Adams, Sept. 11, 1804. Jefferson was here upholding a pardon which he had granted to a man convicted under the Sedition Law,

It is well known that Jefferson would not consent that the Judiciary should be the ultimate arbiter of all constitutional questions; while to allow the judges to determine the scope of authority for the other departments would be, as Jefferson thought, a very dangerous doctrine, and would lay all things at the feet of the Judiciary.

That each department was to be co-ordinate and co-sovereign in the interpretation of the Constitution for itself in its own action, was also shown in the conduct of Jackson.

In 1832, when the bill rechartering the Second United States Bank was passed, President Jackson vetoed the bill, giving, as one of his main objections, that it was unconstitutional. The bank had been in existence for many years, and this bill for a new charter did not alter the constitution of the bank in any material respect. The constitutionality of the law under which the bank was existing had been tested in the United States Supreme Court. In 1819, in the celebrated case of *McCulloch vs. Maryland*, the Court unanimously decided that the law was constitutional. In 1824, in another case, this decision was reaffirmed by the same Court. President Jackson, however, did not feel bound by these decisions, and he insisted that the Executive, like each of the other departments, was to be its own judge on constitutional questions that came within its particular sphere of action. In his Bank veto message he said:

Jackson  
Vindicates  
Executive In-  
dependence.

“It is maintained by the advocates of the Bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a danger-

on the ground that the law was unconstitutional. See also Jefferson to Jarvis, *Works*, vol. vii., p. 177; Jefferson to Thomas Ritchie, Dec. 25, 1820.

ous source of authority and should not be regarded as deciding questions of constitutional power, *except where the acquiescence of the people and the States can be considered as well settled.* . . . If the opinion of the Supreme Court covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. *Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."*

In 1841, President Tyler's veto of a new Bank Bill again brought up this question. Mr. Buchanan, afterwards President, then a member of the House, **Executive Independence is Sustained by the Opinion of Buchanan** in defending his vote against the bill and in favor of Tyler's veto, endorsed Jackson's position. He held the legislator to be as independent of the Court as the President. Though all the judges in the country had decided in favor of the Bank, when the question was brought home to him as a legislator bound to vote for or against a new charter, on his oath to support the Constitution, Buchanan held that he would have to exercise his own judgment; if the arguments and opinions of the judges failed to convince him that the law was constitutional, he held that he would be guilty of perjury if he voted in its favor.

In June, 1854, Charles Sumner was bitterly assailed in the United States Senate by pro-slavery Senators for having indicated that he would not help to enforce the Fugitive Slave Law of 1850, which he deemed unconstitutional. The constitutionality of the law, or a similar one, had been upheld by the Court. Sumner was charged with violating his oath to support the Constitution of the United States. In his speech in reply to his assailants, after quoting Jackson and Buchanan as good Democratic authority, Sumner said:

"I have sworn to support the Constitution as I understand it, and not as it is understood by others. Does any Senator here dissent from this rule? At all events, I accept the rule as just and reasonable,—in harmony, too, with that liberty which scorns *passive obedience*, and asserts the inestimable right of private judgment whether in religion or politics. In swearing to support the Constitution at your desk, Mr. President, I did not swear to support it as *you* understand it. I swore to support the Constitution as I understand it, not more, not less."

Lincoln's words are to the same effect. In his debates with Douglas in 1858, he quoted Jackson with approval, and he gave notice that he regarded the Dred Scott decision as erroneous; and while no resistance should be offered to it as the law in the particular case decided, yet Lincoln denied that the country should feel bound by it as a precedent; both he and Seward charged the President and the Chief Justice with collusion, and there is no doubt that, as President, Lincoln would have refused to be bound by the Supreme Court's decision; that he would have continued to assert the power of Congress, and he would have used all the powers of the Presidency, to prohibit slavery in the Territories, in opposition to the Court.

Webster held a somewhat different view. While speaking in party opposition to Jackson's veto of the Bank Bill, Webster asserted that a decision of the Supreme Court of the United States was binding on all other departments of the Government. When the question is whether the law is to be passed, the legislator and the President must determine for themselves whether Congress has constitutional power. But when the question is whether a statute which *is* in force shall be continued or amended, a previous decision of the Supreme Court that the original statute was constitutional has a greater

And of  
Lincoln. on Executive  
the President

Webster's  
View of  
Executive  
Dependence  
on Judicial  
Opinion.

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force than the mere weight of the reasoning by which the Court upheld it. Mr. Webster pointed out that the same principle of action on which the President, in his legislative capacity, refused to approve a law continuing an existing law in force would enable him, in his executive capacity, to refuse to execute a law which he deemed unconstitutional.<sup>1</sup> Webster said:

"The President is as much bound by the law as any private citizen, and can no more contest its validity than any private citizen. . . . The President may *say* a law is unconstitutional, but he is not the judge. Who is to decide that question? The Judiciary alone possesses this unquestionable and hitherto unquestioned right. The Judiciary is the constitutional tribunal of appeal for the citizen against both Congress and the President, in regard to the constitutionality of laws. . . . If we depart from the observance of these salutary principles the executive power becomes at once purely despotic."

No doubt Jefferson and Jackson, Sumner and Lincoln, were right in their view that a President must judge for himself as to his constitutional duty, and that he has a perfect right to refuse his sanction to a bill on constitutional grounds, though such a bill has previously been held to be constitutional by the Supreme Court. On this point Judge Cooley says:

"It has been claimed, however, that when the point of constitutional law which the case presents is one which has previously received judicial examination and decision, the President may not rightfully disregard this decision and base his negative on his own opinion opposed to that of the Judiciary."

7.  
Cooley on the  
Relation  
of the  
Departments.

"That the President has a discretionary power to veto a bill for any reason that appears to him sufficient is undoubted.

<sup>1</sup> See Curtis, G. T., *Constitutional History of the United States*, vol. ii., p. 70; G. T. Curtis's *Life of Webster*, vol. i., p. 417; Hamilton, in No. 78 of the *Federalist*.

The Constitution gives the power and makes no exceptions. That it is proper that he pay great deference to the judicial authority on such questions as have already been authoritatively determined may also be conceded. But that he is guilty of any violation of duty, or is disrespectful of the Judiciary, or disregards any just principles of government when he acts upon his own judgment of constitutional right, power, or obligation involved in any proposed law is not admitted. When he does not approve a bill, he is to withhold his approval, and when he may do so on the ground of mere expediency, it would be remarkable if he were not at liberty to do so when his objection<sup>1</sup> goes to the very right of the legislature to pass the bill at all."

But Webster was also right in asserting that a President should not refuse to execute a law merely because in his opinion it is unconstitutional. The importance of this view of Webster's was emphasized by Jackson's high-handed conduct in his refusal to execute the law as declared by the Supreme Court for the protection of the Cherokee Indians against the State of Georgia. It was in the case of *Worcester vs. Georgia* (1832), in which the Court declared it to be the President's duty to protect the Cherokees, that Jackson is said to have made use of the notable expression, "John Marshall has made his decision: now let him enforce it." This was an illegal attitude on the part of the President. But there was no remedy in the Judiciary. If the President violates his oath to execute the law it is the duty of the House to impeach him and of the Senate to convict and remove him. If the houses fail to impeach, the only remedy lies in the power of the people to relieve such a President from office at the next election. If the people endorse the President's course by re-election, as in the case of Jackson, the sovereign voice has spoken, and that is final.

The  
President  
is Bound by  
the Law.

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The President is bound to execute an act that has been

<sup>1</sup> *Constitutional Law*, p. 162.

passed over his veto, no matter if such an act seems to him clearly unconstitutional. He may not violate or disregard this act as a means of testing its validity before the Court. This would be to give him the suspending power. It would be a double veto: one veto to be overcome only by a two-thirds majority in both Houses, the other to be overcome only by a judicial decision. The constitutionality of an act of Congress can be brought before the courts only by persons not charged with the execution of the laws, whose interests are affected by the act in question. This principle was argued at length in the impeachment trial of President Johnson.<sup>1</sup> The President's constitutional prerogatives may be infringed upon by an Act of Congress, as was done in the Tenure of Office Act in 1867; but the only defence of the President is in his veto.

Nor can the President be restrained by injunction from carrying into effect an Act of Congress alleged to be unconstitutional. This was made clear in Reconstruction times. On March 2 and 23, 1867, Congress passed two measures commonly called the Reconstruction Acts. These Acts recited that no legal State governments for the protection of life and property existed in certain Southern States, and that it was necessary that peace and order be maintained there until loyal Republican States should be established; and it was made the duty of the President to use military authority in protecting property, punishing violence, and maintaining order. These Acts President Johnson vetoed as unconstitutional, and they were passed over his veto.

A motion was made before the Supreme Court "for leave to file a bill in the name of the State of Mississippi praying the Court perpetually to enjoin and restrain Andrew Johnson, President of the United States, and his officers and agents, and especially A. O. C. Ord (General), assigned as military

*The President may not be Restrained by Injunction.*

*Mississippi vs. Johnson, 1866.*

<sup>1</sup> See Burgess's *Reconstruction*, pp. 182-183, *et seq.*



commander of the district of Mississippi, from executing or in any manner carrying out the two Acts of Congress named in the bill," on the ground that the Acts were unconstitutional.

The Attorney General objected to the leave to file the bill, upon the ground that "no bill which makes a President a defendant and seeks an injunction against him to restrain him in the performance of his duties as President should be allowed to be filed in the Court." The Supreme Court sustained the objection and refused to consider its right to restrain the President, "without expressing any opinion on the broader issues, whether in any case the President of the United States may be required by the process of this Court to perform a *purely ministerial* act under a positive law, or may be held amenable, in any case, otherwise than by impeachment for crime."<sup>1</sup>

It was assumed by the attorneys for Mississippi that President Johnson, in the execution of the Reconstruction Acts, was required to perform a mere ministerial duty. This confounds the terms *ministerial* and *executive*, which are by no means equivalent.

Distinction  
between  
Ministerial  
and Execu-  
tive Duty.

A *ministerial* duty, the performance of which may, in proper cases, be required of the head of a department by judicial process, is one in respect to which nothing is left to discretion. It is a simple definite duty, arising under conditions admitted or proved to exist, and imposed by law. It is the act of an agent who must act as directed, without discretion.<sup>2</sup> In his *executive* duty the President acts as a *principal*. In this capacity he stands instead of the people, subject only to the control of other prin-

<sup>1</sup> Mississippi *vs.* Johnson, 1866.

<sup>2</sup> Marbury *vs.* Madison affords an illustration. The delivery of the commission to Marbury was a purely ministerial act and a lower court might have issued a *mandamus* to compel this act. See p. 100. See also Kendall, Postmaster-General, *vs.* Stockton and Stokes; Boyd's *Cases in Constitutional Law*.

cipals whom the people have appointed in their stead. He has power to control the executive policy within considerable discretion. The people may hamper and weaken their President and reduce his discretion by a hostile two-thirds majority in Congress,—by laws limiting his powers or interfering with his prerogatives, passed by this majority that stand ready to impeach the President if he disregards their restrictions. Thus Congress may put the President in a sort of strait-jacket and bind him down by restrictions. But the people, when they assume to exercise such power through Congress, should remember that they, too, must act according to law, and they have a right to limit the President's powers only within legal limits. If they wish to take away the President's rights, powers, and prerogatives through Congress they must do so by a constitutional process, and not by the mere application of a brutal majority.

We may profitably sum up this subject of executive independence in the words of one of the best-known American authorities in constitutional law:

“ Within the sphere of his authority the Executive is independent, and judicial process cannot reach him. But when he exceeds his authority, or usurps that which belongs to one of the other departments, his orders, commands, or warrants protect no one and his agents become personally responsible for their acts. The check of the courts consist in refusing the sanction of the law to whatever act is in excess of it, and of holding the executive agents and instruments to strict accountability.”<sup>1</sup>

It is in this way the Americans have separated the governmental powers. Some writers have preferred the

<sup>1</sup> Cooley, *Constitutional Law*, p. 157. See also Kent's *Commentaries*, vol. i., pp. 500–507; Webster on the Independence of the Judiciary, *Works*, vol. iii., p. 29.

English system, by which these powers are concentrated in one body. In England all departments of the government are controlled by a sovereign ministry. It is said that by confiding legislative power and the election and control of the Executive to the same hands, the nation is enabled in any time of emergency to act with its whole force. The English Premier, while supported by his party majority in the Commons, is absolute; he may appoint whom he pleases, dismiss whom he distrusts, and spend whatever is necessary. The English, under their system, in a time of great public emergency, may dismiss an inefficient Executive and call their strongest, most capable man into power. The American people cannot do this.

English and  
American  
Systems  
Compared.

“ The framers of the Constitution were possessed with two fears: that the Executive might become too strong, and they therefore deprived it of any place in Congress; and that it might become too weak, and they therefore made its chief irremovable except by impeachment, vesting him at the same time with absolute power to appoint and to dismiss his advisers, and with the initiative in the nomination and removal of all officers, an initiative which during the recess of Congress becomes a right of appointment. The result of this arrangement is that in an emergency, like a great war, an inefficient President means incurable inefficiency in all departments. There is no power of removing him, there is no power of compelling him to trust the right men, there is no power of coercing him into a greater display of energy. He moves on in his own path more uncontrolled than an Emperor of Russia, for the army has in Russia an influence in emergencies which is never disregarded. Suppose that in a dangerous war crisis, the President, being, as he is, the sole source of executive energy in the Republic, is unequal to his position, does not feel clear what he ought to do, does not pick precisely the right men—in short, suppose, through sheer stubbornness or incompetency,

The  
Danger  
in the  
Independence  
of the  
American  
Executive.

✓

he fails to rise to the occasion and do what is necessary,—where is the remedy? There is simply none. The United States might possess the greatest organizer alive; the American people might be boiling over with irritation; the Army and Navy might be almost mutinous in their despair at inaction; and still there would be nothing to be done. The President cannot be removed; he is no more bound to obey opinion than a judge is; and as to the officers, what can they do except wait sullenly on till final orders are received?"<sup>1</sup>

This criticism of our Presidency in comparison with the English Ministry has force. In 1861, the nation was impatient and angry because President Buchanan in a time of great emergency seemed nerveless and inactive. Yet nothing could be done but to hope that the President would surround himself with better advisers and virtually give the reins to stronger hands, as Mr. Buchanan finally did, or to wait till his term had expired. But perhaps this criticism disregards too much the influence of public opinion. This is powerful, if not decisive, and it generally leads the President to act in harmony with the positive and pronounced desire of the nation. And as a matter of fact, in great war emergencies, our Presidents have done well. Experience has shown that they can be trusted to rise above personal and party purposes and act patriotically for the nation's welfare. But it must be recognized that the system makes possible an incompetent Executive for a crisis, or a base betrayal of his trust. If the American people should be called to face a dreadful occasion with such an Executive, whom they could not remove for several years, they might think it advisable "by a rapidly passed amendment to allow the House of Representatives to put the continuance in office of such

<sup>1</sup>London *Spectator*, June 25, 1898, article on "The Sovereignty in America, France, and England." The student is advised to consult this article.

a President before the people to be decided by a 'Referendum.' " " "

Why did the statesmen of 1787 adopt the present system of the separation of powers rather than the Parliamentary system of the union of these powers?

Three reasons have been urged in explanation of this:

1. The experience and observation of the men of 1787 under the English Constitution.

It was supposed that that Constitution properly administered would secure the separation and independence of governmental powers. The result reached by our Constitution-makers was partly the result of their misapprehension of what the English Constitution was coming to be. That Constitution was not then what it is now. It was not then quite what our fathers thought it was, though recently it had been, to all appearances, as they understood and interpreted it. It was in process of change. The ministerial system of a Cabinet responsible to the Commons and not to the king was in the process of development. If such a Cabinet had previously existed in England, it was not because it was seen to be an essential part of the English Constitution, but from the circumstances of the times. The first two Hanoverian kings of England, George I. (1714-1727) and George II. (1727-1760), were not able to speak the English language and were more or less indifferent to the management of the English Government; if they could reign in honor and be undisturbed in their royal revenues, they were ready to leave the real and responsible business of government to their Ministers. They were more interested in Hanover, and the questions of state were a burden to them; they were willing to leave these to Walpole, the first Prime Minister, and to his successors. These kings had a right

Why  
Separation  
of the  
Departments  
was  
Established.

X

Influence on  
American  
Opinion of  
Experience  
under  
George III.

X

<sup>1</sup> *Spectator*, June 25, 1898.

to attend Cabinet meetings, but if they attended they probably went to sleep while bills and budgets were being discussed. Consequently, royal attendance at Cabinet councils declined. It was easier to govern through the Prime Minister, and the Parliamentary government of the times of Walpole and Pitt sprang up, and able Ministers managed the Commons. But when George III. came to the throne, he proposed to govern as well as to reign. His mother told him to be king, to be the Executive in fact as well as in name. He attempted to be the real manager and director of government in Parliament. By his patronage and bribes and Court favors he was able to place his supporters in Parliament, and the "King's friends" became the chief power in the State. It was in 1780, but a short time before our Constitution was made, that the Dunning resolution was carried in Parliament that "the power of the Crown has increased, is increasing, and ought to be diminished." George III.'s temporary personal power, from 1760 to 1783, led our fathers to overestimate the monarchical element in the English Constitution. To them the king appeared to be the real Executive, and they believed that his attempts to control the legislature were dangerous to liberty. The legislature should be kept free from the bribes and threats and power of the king, who was constantly attempting to put his hand in where it did not belong. Consequently, in creating the President, who was to represent the monarchical element in our Government he must be kept from doing what George was doing,—from influencing and controlling the legislature. The Constitution, therefore, while throwing restrictions and limitations around the President, should make the legislature separate and independent of his control.

2. The political philosophy which the makers of our Constitution accepted taught that freer and better government would be promoted by the separation of the

three departments of government. This was the political theory of the time, and it was deeply instilled in the minds of American political thinkers and statesmen. The treatise on government which most influenced them at the time and with which they were familiar, was *The Spirit of Laws*, written by Montesquieu, a Frenchman.

Influence of  
Political  
Philosophy  
on the  
Separation  
of the  
Powers of  
Government.

"This book," says Mr. Bryce, "had won its way to an immense authority on both sides of the ocean. Montesquieu, contrasting the private as well as the public liberties of England with the despotism of continental Europe, had taken the Constitution of England as his model system, and had ascribed its merits to the division of legislative, executive, and judicial functions which he discovered in it and to the system of checks and balances whereby its equilibrium seemed to be preserved. No general principle of politics laid such hold on the Constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom. It had already been the groundwork of several State constitutions. It is always reappearing in their writings; it was never absent from their thoughts."<sup>1</sup>

Blackstone, in his *Commentaries*, published in 1761, describing the theory rather than the practice of the English Constitution, presented the same idea that our fathers had received from the political philosophy of Montesquieu. "Whenever the power of making and that of enforcing the laws are united together there can be no public liberty."<sup>2</sup> "The powers and functions of the Cabinet, the overmastering force of the House of Commons, the intimate connection between legislation and administration, these which are to us the main characteristics of the English Constitution were still far from fully developed."<sup>3</sup>

<sup>1</sup> *American Commonwealth*, vol. i., pp. 29-30.

<sup>2</sup> Blackstone.

<sup>3</sup> Bryce, vol. i., p. 29.

3. The third influence making for the separation of governmental powers was the precedent of the State constitutions and the experience of the colonial and State governments. In the Colonies, the Executive was the governor, usually appointed by, and dependent upon, the Crown. The colonists stood for charters and constitutions which tended to restrain the royal prerogative and power exercised through the royal government. Many of the men who framed our Constitution had lived under colonial charters which had drawn lines of separation between the departments of government, and between 1776 and 1787 they had helped to form State constitutions which defined these lines still more distinctly. They were merely acting in harmony with the experience of their past and the teaching of their times.

It was early agreed in the Convention that the new Central Government should have an authority to execute the laws. Should this authority be single or plural; should it consist of one person or of more than one? Mr. Wilson favored a single Executive as "giving most energy, despatch, and responsibility to the office." Mr. Randolph thought a single Executive would be the beginning of monarchy. The temper of the people was averse to the semblance of monarchy. "It was agreed," said Randolph, that "vigor, despatch, and responsibility were the qualities needed in the Executive, but unity was not necessary and a plural Executive was just as efficient. A single magistrate would never secure the confidence of the people. It would be too much like the English king."

Mr. Wilson replied that a single Executive would not be unpopular. All the thirteen States, though agreeing in scarcely any other instance, agree in placing a single magistrate at the head of the Government. There can be no co-ordinate heads in a government. The experience



of Holland was held up as conclusive evidence of a plural Executive. Unity would favor both the tranquillity and the vigor of the Government. It was feared that the resemblance between a single Executive and the king would cause a rejection of the whole plan by the people. It was thought wise to attempt to prove in the *Federalist* that no very close analogy existed.<sup>1</sup> The arguments urged by Wilson and others carried the Convention, and a single Executive was agreed to.

The President's term was fixed at four years and he is eligible to re-election. Washington accepted a second term, but refused a third. Jefferson also might have been elected a third time, but he followed the example of Washington and refused a third term. President Jackson, who was very popular with the people, commended this precedent, and no serious attempt was ever made to elect a President to a third term until, in 1880, some of the friends of ex-President Grant sought to secure his third election. The attempt was not received favorably, and was defeated, and it may now be said to be a part of the unwritten constitution that no President is eligible to a third term. Many think it would be better if the President were not eligible even to a second term; that he would not then be tempted to use the power and patronage of his office to secure a re-election; that, as it is, most of his thought and attention are occupied during his first term in considering, not how he may make a good President, but how he may secure a second nomination; and consequently he must do, not what the nation needs, but what the political managers require. This question was greatly discussed in the Convention and was closely connected with the length of his term and the mode of his election. If he were to be elected by Congress as first proposed, it was thought he should not be re-eligible,

Term of  
Office and  
Re-eligibility.

Mode of  
Election and  
Re-eligibility.

<sup>1</sup> See *Federalist*, Nos. 67 and 69.

X  
 for in that case he would be constantly intriguing with Congress for re-election. The framers of the Constitution never once imagined that a President <sup>Re-election</sup> would use the patronage of his office, through <sup>and</sup> party politicians, to secure his re-election by the <sup>Patronage.</sup> people or the continuance of his party in power. Many favored a longer term than four years, some five, some six, some seven, some ten,—the longer the term the more pronounced the disposition not to allow a re-election. Hamilton, who most of all favored a strong government, and wished to create the strongest possible Executive, favored the appointment of the President for good behavior or for life, subject only to removal by impeachment. This, of course, would not be tolerated to-day. But we must remember that Hamilton did not foresee a party President or one that would use his office for party ends. He wished to promote stability and force in the government, not democracy; and to Hamilton's mind the President should be like the English sovereign of to-day, above parties and party strife, holding an even and impartial hand between contending parties. But, as it turned out, our President was to have real not merely nominal powers; and he has come to be a party leader and to have even larger powers than were anticipated. Hamilton's plan, so far as the presidential powers extend, would have prevented "government by the people."

The method of electing the President provided by the Constitution is as follows:

"Each State shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no <sup>How the President is Elected.</sup> Senator or Representative, or person holding an office of trust or profit under the United States shall be appointed an elector."<sup>1</sup>

<sup>1</sup> Constitution, Art. II., Sec. 1, Cl. 2.

“The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom at least shall not be an inhabitant of the same State with themselves.”<sup>1</sup>

The body of the electors, when they meet in their respective States to vote for President and Vice-President are called the Electoral College. Congress may determine the time for choosing the electors and also the time for their meeting in the College to choose the President. They are now elected, in the year of the presidential election, on the first Tuesday after the first Monday in November,—the day appointed by an act of 1845. By this act the day for choosing the electors is the same throughout the United States, though this is not required by the Constitution. In all the States the electors are chosen by popular vote, and in most of the States the balloting is by the Australian system. It is not necessary that the names of the presidential candidates should be upon the ballot. In point of law the voters vote for the electors, not for the party candidates. The electors meet for their final voting in their respective State capitals on the second Monday in January. Originally, by the Act of 1792, the meeting of the Electoral College was required to be on the first Wednesday in December, and the popular election was to be thirty-four days preceding this. But by the Act of 1887, the first Monday in January was fixed for the meeting of the College. The electors meet in their respective State capitals on the same day. They organize by electing one of their number chairman and by choosing a secretary. If an elector should die between the popular election in November and the meeting of the College, or be prevented by sickness or accident from attending the College, the remaining electors may choose some one to fill the vacancy. The electors ballot, all voting for the

<sup>1</sup> Twelfth Amendment.

candidate for whom they were elected to vote.<sup>1</sup> They must name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President.

The law requires three certificates of the result of the ballot in the respective States to be kept. One is filed with the Judge of the United States District Court of the electors' State, one is sent by mail, and one by messenger—usually one of the electors—to the President of the Senate. "The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted."<sup>2</sup> The day appointed for the counting in Congress is the first Wednesday in February. If no candidate for President receive a majority of the electoral

**Eventual  
Choice of  
the President  
by the  
House.**

votes, then from the three highest "on the list of those voted for, the House of Representatives shall choose immediately by ballot the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote"; a quorum for this purpose shall consist of a member or members from two thirds of the States, and a majority of all the States shall be necessary to a choice. In the election of the Vice-President,

**Eventual  
Choice of  
the Vice-  
President  
by the  
Senate.**

if a majority of the Electoral College do not unite on a candidate, "then from the *two* highest on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two thirds of the whole number of Senators, a majority of the whole number being necessary to a choice." If no President is elected by either the Electoral College or the House before the expiration of the current presidential term on the 4th of March following, and if a Vice-President should be elected by that time, the Constitution provides that this Vice-President

<sup>1</sup> See p. 133 on Act of 1887.

<sup>2</sup> Constitution.

shall become President until an election of a President is accomplished. If neither President nor Vice-President be elected by March 4th, the Constitution does not indicate who shall act as President, and nobody is vested with power to determine the question. There would be an interregnum, unless the existing President and Vice-President should resign before the close of their term, in which case, by the provisions of the Presidential Succession Bill, the Secretary of State would act as President until an election be made. The Constitution should provide that an existing President should hold office until his successor be elected.'

The above is the process prescribed by the Twelfth Amendment to the Constitution.<sup>1</sup> Formerly, before this Amendment was adopted, the electors might vote for two persons without designating which one was intended for President and which for Vice-President. The person receiving the greatest number of votes was to be President, provided that number were a majority of all the electors appointed; and after the choice of the President the one receiving the next highest number of votes should be Vice-President, no matter whether the votes cast for him be a majority of all or not. John Adams was elected Vice-President in 1789, although he did not receive half the votes. This system soon led to confusion and to a disputed election. In the election of 1800, Jefferson and Burr each received the same number of votes, each having a majority. The electors desired to have Jefferson for President and Burr for Vice-President, but the Constitution provided no means of their designating that, and when each received the same number of votes the election for President was thrown into the House. Jefferson was elected

Disputed  
Election of  
1800. The  
Twelfth  
Amendment.

<sup>1</sup> Burgess, vol. ii., p. 239.

<sup>2</sup> See "A Study of the Twelfth Amendment," by Lolabel House, Doctor's Thesis, University of Pennsylvania, 1901.

there, but only after a severe contest. This contest led to the adoption of the Twelfth Amendment, which provides the present mode of election.

X Why the Electoral College was Adopted.

The device of the Electoral College was adopted chiefly for two reasons:

1. To avoid the necessity, on the one hand, of election by Congress. This, it was thought, would have subjected the Executive to the legislature in violation of the principle of the separation of powers. The President was to be independent of Congress. He was to be dependent upon the people and free to guard their welfare.

2. To avoid, on the other hand, direct popular election. This was then thought to be a dangerous democratic extreme. The idea was that the people were not competent to make the election themselves; they would be the dupes of wily demagogues who would mislead and deceive them. They were subject to dangerous excitements and passions and were not to be trusted with such responsibility. But the people might be allowed to elect the wisest and most competent men among themselves, who from their greater knowledge of the needs of the country and of the eligible men for the Presidency might go aside into a deliberative assembly where they would be free to choose a fit man for President. When it was first proposed in the Convention that the President should be elected by the people, the member who proposed it<sup>1</sup> apologized for the suggestion; he was

Dread of Democracy in the Constitutional Convention.

reluctant to declare the mode which he favored, being apprehensive that it might appear chimerical. Another thought the people too little informed, too liable to deception, and it was declared that<sup>2</sup> it would be "as unnatural to refer the choice of a proper character for chief magistrate to the people as it would be to refer a trial of

<sup>1</sup> Mr. Wilson, of Pennsylvania, under date of June 1, 1787.

<sup>2</sup> Mr. Mason of Virginia, under date of July 17, 1787. See Debates of the Convention.

colors to a blind man. It was supposed that the electors would be the best men in their respective States, and that in their unfettered discretion they would choose the fittest man for President in all the country.

The failure of this scheme is familiar to all. The anticipations of the framers in this matter have been entirely disappointed. It is now known that the electors are not independent; they are not free to choose whom they will; they do not exercise their own discretion. They are chosen under a pledge of honor to vote for a particular candidate. When they meet, the people have already chosen the President. The electors are merely the agents of their party, appointed to ratify the election already made. Who and what they are, whether they are the best and wisest leaders among their respective States, no one knows and no one cares. The electors are personally of so little account, and their standing and party relation so little known, that it is now the custom (though it is not necessary), to place the names of the presidential candidates at the top of the ticket on which the electors' names are printed, so as to enable the voter to know which set of electors stand for his party. As to the personnel of the electors, it is sought only to know that they will faithfully stand by the party nominee and register the result which they are elected officially to proclaim. An elector may be nominated because he is a good speaker and he may be expected to canvass his district for his party, and perhaps he will expect some party appointment or reward after the election of his candidate.

It would be perfectly legal and constitutional for an elector to vote for whom he pleases other than his party candidate. A Republican elector in any State carried by that party might vote for the Democratic candidate and divide the vote of the State and thus defeat his party

The Failure  
of the  
Electoral  
College.

Character  
and  
Functions  
of the  
Electors.

nominee; his vote would have to be counted as he cast it, not as he was elected to cast it, and there would be no law to punish the recreant elector. Some extra-legal punishment would probably be devised for an elector who refused to vote for the party candidate for whom he had been elected to vote, especially if his vote contributed to his party's defeat. He would be looked upon as a traitor to his party and his party's cause, and he would probably not find it comfortable to return home. At any rate he would be ostracized and despised and would be visited with the social condemnation and contempt due to one who had been guilty of an infamous betrayal of a public trust; and a presidential candidate elected by such betrayal would probably not accept the office. Public sentiment would be so universal against such an act, and the party fealty of the electors is so well guarded that it is safe to say that no such act is apt to occur. No law of the Constitution is stronger or more inviolable than this unwritten one that a Presidential elector is required to vote for the party candidate selected by the party convention and the popular election. But this is a great change in the electoral system from what our fathers intended, and from the actual practice in the first few elections.

How was this change brought about? By a change in our party customs and party machinery and by the rise of the representative party convention. To understand this change fully, we must notice the rise and growth of our party system, a subject considered in a companion volume to this work.<sup>1</sup>

No part of the Constitution was regarded with more satisfaction by the framers than the Electoral College. It is often said that it is about the only original thing in the Constitution — the only actual invention of the Con-

<sup>1</sup> See the author's *Political Parties and Party Problems*.

The Law  
of the  
Unwritten  
Constitution  
Binds the  
Electors to  
Vote for  
the Party  
Candidate.



vention — not based on an existing institution or a previous experience, and it is the one part of that instrument that has utterly failed to fulfil expectations. But while this plan of electing the President finds no precedent in the Old World it was not entirely new. In the Constitution of Maryland, adopted in 1776, we find an almost exact counterpart of the electoral scheme. The State Senators in Maryland were elected by a body of electors chosen every five years by the voters of the State for this particular purpose. Bowdoin, in the Massachusetts Convention that ratified the Constitution, recognized that the method of choosing the President was probably taken from Maryland's method of choosing Senators.<sup>1</sup> "The mode of appointment of the Chief Magistrate of the United States is almost the only part of the system which has escaped without some censure, or which has received the slightest mark of appreciation from its opponents."<sup>2</sup>

Precedent  
for the  
Electoral  
College.

x

In the first two elections (1789 and 1792) all the electors voted for Washington without question, though they generally divided according to party opinion, then forming, on the Vice-President. In the election of 1796, the electors were still left unpledged, but in electing them the voting was on party lines, and when they came to cast their votes they voted as they were expected to,—the Federalist electors for Adams, the Democratic electors for Jefferson. By 1800, the notion of leaving any freedom and discretion to the electors had vanished, and it has ever since been agreed that the nation, not the electors, must decide who shall be President.

Each State is left free to determine its own method of choosing the electors. The method is now uniform

<sup>1</sup> See Publications of American Academy, No. 9, cited in Stevens's *Sources of the Constitution*, p. 154.

<sup>2</sup> *Federalist*, No. 67; see also No. 1 of the *Federalist*, and Wilson in the Pennsylvania Convention; Elliott, vol. ii., cited by Bryce, vol. i., p. 41.

throughout the States. They are elected in each State on a common ticket, all the electors being voted for by

**The States Determine on the Method of Choosing the Electors.** all the voters, generally under manhood suffrage.<sup>1</sup> Formerly the States chose the electors in various ways,—some by the legislature, some directly by the people on a common ticket, and some by the people in districts. In 1824,

eleven of the twenty-four States elected by districts. By 1832, all but South Carolina and Maryland used the method of electing by popular vote on a general ticket. South Carolina continued to elect her Presidential electors by the legislature until the Civil War. The feeling that the people had been deprived of their choice in 1824, and the Democratic movement under Jackson, leading to a change in the party system, had led in the direction of the more popular plan for the election of the President. In 1891, the Democratic Legislature of Michigan passed a law providing for the district plan of election. Michigan

**The District Plan Revived in Michigan, 1891.** is usually a Republican State, but in the election of 1890, by a "landslide" in politics, the Democrats carried the State and secured a ma-

jority of the legislature. In view of the approaching presidential election of 1892, they provided that Michigan should elect her Presidential electors by districts, as in this way the Democrats, who expected to lose the State in 1892, would be sure of electing at least a few of the electors from the various districts. It is seldom a party carries all of the Congressional districts of a State. The Republicans contested this Democratic law before the courts, but both the Supreme Court of Michigan and then the Supreme Court of the United States—the majority of each Court being Republicans—decided<sup>2</sup> in favor of the constitutionality of the Michigan

<sup>1</sup> There are constitutional restrictions in some Southern States barring a large part of the colored vote.

<sup>2</sup> The decision does not support the right of a State to provide that all

law. It is, therefore, the law that the States may determine the method of choosing the electors. The legislature might itself choose the electors, or authorize the governor to appoint them, or cause them to be selected in any manner it may deem best, by districts, by a general ticket, by a limited or by a universal suffrage. The States may also determine the qualification of the electors, except the qualification named in the Constitution,—that they “shall hold no office of profit or trust under the United States.”<sup>1</sup> It is a party custom that has brought us to the uniform system of electing on a general ticket. To make sure of uniformity the States would have to adopt a constitutional amendment. The Michigan law provided for choosing the Congressional electors by Congressional districts, and the Senatorial electors by districts created for that purpose. The law was accompanied by an apportionment act (a gerrymander), and thus the two laws together brought the electoral vote of the State under the influence of the “gerrymander.” President Harrison felt that this would bring the three great departments of the Government within the grasp of the gerrymander and would promote “disgraceful partisan jugglery” in the choice of the President, and he called attention to the necessity of reform in his message of December 9, 1891.<sup>2</sup>

In recent years much dissatisfaction has arisen with the Electoral College, and there is considerable demand for its abolition. Since it has been virtually superseded in party practice it is looked upon as a cumbersome piece of machinery which might as well be abandoned. Three plans

Proposed  
Changes in  
Methods of  
Electing the  
President.

the electors should be elected by a single district, regardless of the rights of the other districts. In the decision rendered by Chief Justice Fuller, a careful consideration was made of the various methods used by the several States at different times previous to the decision. See United States Supreme Court Reports, 146.

<sup>1</sup> Constitution, Art. I., Sec. I.

<sup>2</sup> Richardson's *Presidents' Messages*, vol. ix., p. 208.

have been proposed in substitution, each of which, it is claimed, is fairer, more direct, and more democratic:

1. *The District Plan*.—This is the "Michigan Plan," to which we have referred. It involves the choice of an elector for each Congressional district and two for each State at large.

This would be very much like electing the President by the two Houses of Congress, except that the Senatorial electors would be chosen by a direct vote of the people, and all of them would be chosen especially and only for the purpose of choosing the President, while the members of Congress are chosen for other purposes.

2. The allotment of electoral votes in each State to the candidates in proportion to the popular vote received by each,—the proportion to be determined by the proper returning board. Let the presidential election be held on the same day in all the States; let the States be allotted electors as they now are, and in ascertaining the result let each candidate voted for be entitled to have counted in his favor a number of electoral votes corresponding to the number of popular votes received by him. This plan would not impair the rights and powers now possessed by the States in the election of the President; nor would it involve election by a majority or plurality of all the popular vote cast in the United States. This would not disturb the "compromises of the Constitution" by swamping the small States and reducing them to insignificance, for each State would still be awarded three electoral votes, two for its Senators and one for its Representative, regardless of its number of inhabitants. It would appear useless under this plan to vote for electors, for a State election board could allot the vote of the State to the respective candidates according to mathematical proportion.<sup>1</sup> This, like the District Plan, involves the retention of the

✓  
Plan of  
Proportional  
Representa-  
tion.

<sup>1</sup> See Prof. J. R. Commons's "Proportional Representation" for an

Electoral College but it provides also for more accurate proportional representation.

3. The abandonment of the Electoral scheme entirely, by providing for the choice of the President by direct popular vote. If the McKinley majorities from the States carried by the Republicans footed up more than the Bryan majorities from the Democratic States, Mr. McKinley would be declared elected. For electoral purposes under this plan the relation of the States to the Federal Government would be the same as that of the counties to a State. Any vote anywhere would count the same in the aggregate, and, therefore, in determining the result. This would involve an abandonment of an election by States, and would consider the country for the purpose of the presidential election as a consolidated nation, to be governed by the simple numerical majority.

Plan for  
Direct  
Popular  
Vote

*for (handwritten)*

X

A few words as to proposed changes.

Under the present system the party electors in a State are usually all lost or won together.<sup>1</sup> It is senseless to scratch an elector for personal reasons, for if that were generally done by the party voters it would result merely in losing an electoral vote in the State for the candidate of the voters' choice. The first two plans proposed, while retaining the Electoral College, would allow the minority some representation and make the College more representative of the popular vote. For illustration, in 1884, the outcome of a hotly

*And. Election*

Why a  
Change is  
Desired.

X

elaboration of this principle. Also John G. Carlisle in the *Forum*, No. 24, p. 651, "Remedy for Dangerous Defects in Election of the President."

<sup>1</sup> When a State is carried by a very close vote, it sometimes happens that one or two electors of the defeated party may win. Under the Australian system of voting, many voters have been known to stamp merely the first elector on their party list under the mistaken supposition that by so doing they were voting for the whole list. In this way, and sometimes for personal reasons, some electors receive more votes than others. The reasonable expectation is that they should all run together.

contested Presidential election depended upon the outcome in the State of New York. Whichever party carried that State would win. About 1,125,000 votes were cast in the State. The Democratic candidate, Mr. Cleveland, received, say, 563,000 votes, while the Republican candidate, Mr. Blaine, received 562,000 votes. Mr. Cleveland received only about one thousand plurality in the State, but he secured all of the thirty-six electoral votes from New York, while Mr. Blaine received none. The 562,000 Republican votes went for nothing. They could not go to help out the party cause in other parts of the Union. If the thirty-six New York electors could have been divided between the parties somewhat in proportion to the popular vote, the Democrats could have elected not more than nineteen electors, while the Republicans would have chosen at least seventeen. Then the 562,000 minority votes would have had some voice and representation in the Electoral College. Either the Proportional or the District plan would break up the solidarity of the State. The present plan, by which the State may throw its whole weight into one side of the scale, magnifies the importance of the State as such. It provides for election by States. It is in harmony with the original federal idea of the Constitution that the States should be the agencies in the election of the President, though on a proportional basis. This is clearly shown in the mode provided in the eventual election of the President when the election is thrown into the House, where each State delegation casts one vote. The States, especially the large ones, will hardly give up their preponderant importance in the present plan of electing the President. But experience has shown that the present plan concentrates the struggle in the doubtful States, especially in the large doubtful States, for the party carrying these will carry the election; while in the States safely assured to either party the campaign is listless and lifeless and without instruc-

tion. If the forces of boodle and corruption have but to carry a few States in order to win they are encouraged in their work, for, in order to win, they have but to concentrate their energies. In this way the political electorate of New York and Indiana have especially suffered from pollution and corruption during past presidential campaigns. If the proportional plan of election were substituted every vote would count in every State. The Republicans would be encouraged to make a campaign in Texas in the hope of securing a few electors, and the Democrats would make a similar effort in Iowa or Vermont, and men of all parties would be directly interested throughout the Union in preserving the purity and safety of the ballot everywhere.

There is one important if not decisive objection to the District Plan. That is, it would lead to still greater temptation to the party managers within the several States to gerrymander the electoral districts.<sup>1</sup> If the evils of the party gerrymander can be obviated and fair proportional representation provided for within all the States, the District Plan of electing the President would seem to be preferable to the present one. It would be as just, more democratic, and quite as expedient; and the change would probably be more feasible than that of direct election by the people in which the decision would depend upon the aggregate majorities from the various States.

A President has frequently been elected who has not received a majority of the popular vote.<sup>2</sup>

*Free Election*  
X  
Objection to the District Plan. The Gerrymander.

A President may be Elected in Spite of an Adverse Popular Majority. X

<sup>1</sup> See reference to President Harrison's message, p. 125.

<sup>2</sup> In 1824, Jackson had 152,901 votes while Adams received only 114,000. In the College, Adams had 84 and Jackson 99. The combined vote of the candidates opposed to Adams was 247,000. Thus Adams received neither a majority nor a plurality of the popular vote. His election by the House,

Twice an election has been thrown into the House of Representatives: in 1800, when Jefferson was first elected, and in 1824, when John Quincy Adams was elected. In such a case, all the members of the House from a State having but a collective vote, if they are equally divided on the candidates the vote of the State is lost.<sup>1</sup> In 1824, Jackson had ninety-nine electoral votes, while Adams had only eighty-four. Clay had thirty-seven, and Crawford forty-one. The election went to the House, where, by the influence of Clay, who could not be voted for, being fourth on the list, John Quincy Adams was elected. This was thought to thwart the will of the people, and voting by States, gave rise to the cry that the people had been deprived of their choice.

In 1824.

In 1856, Buchanan had 1,838,000, Fremont 1,341,000, and Fillmore 874,000 of the popular vote. Buchanan thus fell 188,000 votes short of half; or, there were 377,000 more votes cast against him than for him. Yet Buchanan received 174 electoral votes, Fremont 114, Fillmore 8.

In 1860, Lincoln had 1,866,000, Douglas had 1,376,000, Breckinridge had 849,000, Bell had 588,000. Lincoln fell 473,000 short of a majority over all, while there were 949,000 more votes against him than for him. Yet of the electoral vote Lincoln had 180, Douglas had 12, Breckinridge had 72, Bell had 38. See Stanwood's *History of the Presidency* for cases in point since 1860.

<sup>1</sup> In 1801 nine votes in the House were required to elect. The House had to choose between the two Republican candidates, Jefferson and Burr. Jefferson controlled eight votes and Burr six, while two States, Vermont and Maryland, were equally divided. Party spirit was very bitter at the time and some of the Federalists advised that the country be left without a President rather than consent to the election of the hated leader of their opponents; while others were advising the election of Burr in order to bring about the disappointment and discomfiture of the Jeffersonian Democrats. In consideration of pledges from Jefferson, as Bayard testifies, the Federalist member from Vermont and the two Federalist members from Maryland (Baer and Craik), and Bayard, a Federalist of Delaware (who controlled the single vote of that State and led this Federalist group), agreed to withdraw their opposition to Jefferson's election, and these four Federalists voted blank on the thirty-sixth ballot, and thereby permitted their Republican colleagues from Vermont and Maryland to give the votes of these two States to Jefferson, and this elected him by the votes of ten States. (See Isaac Jenkinson's *Life of Burr*, chapter v.)



it was charged that a corrupt coalition was made between Adams and Clay. Clay was afterwards made Secretary of State by Adams, which gave color to the charge, but there was not a bargain, corrupt or otherwise, between the two men. But Jackson and his friends always felt that the people had been deprived of their choice, and this election tended to increase the democratic movement for a direct popular choice of the electors and for a more popular system of party nominations. By the time of Jackson's second election, in 1832, the representative party convention system was coming into use.

In 1876, there was a still more serious dispute over the presidential election,—a dispute which clearly illustrated an almost fatal weakness in the system of electing a President by the Electoral College. In that election there were 369 electoral votes, 185 being necessary to a choice. The Democratic candidate, Mr. Tilden, carried, without dispute, 184 votes, lacking only one of enough to elect; the Republican candidate, Mr. Hayes, had 163 votes. In four States,—Oregon, Florida, South Carolina, and Louisiana, with twenty-two electoral votes, there were disputed returns. If in any one of these States the Democratic Electors were found to have been chosen, Mr. Tilden would have a majority in the College and would be elected; while the Republicans in order to elect their candidate must have all of the twenty-two. Of course, the Republicans, as loyal party men, laid claim to all these doubtful States, and the Democrats did the same, though the Democrats would have been satisfied with only one. In the disputed States the two sets of electors met, voted, and sent up the certified returns to Washington. In Congress the Republicans had a majority in the Senate, while the Democrats had a majority in the House. As to counting the electoral vote the Constitution says: "The President of the Senate shall, in the presence of the Senate and House of Repre-

Contested  
Election  
of 1876.

sentatives, open all the certificates and *the votes shall then be counted.*" Who shall do the counting? The Republicans contended that the Vice-President (Senator Ferry, of Michigan, a Republican) should determine what votes should be counted. But the Democrats insisted that the two Houses, voting separately, had always determined the validity of electoral votes, and as Congress was called upon by the Constitution to witness the count, it was reasonable to conclude that Congress itself was the responsible counting body. This might do, provided the two Houses were in agreement, with the same party in control of both, but in this case they were in disagreement and a deadlock between the two Houses would be the result. For it was understood, and it had always been so, that in such cases the two Houses would vote from party motives and according to party interests.

To break this deadlock between the two Houses in 1876, in order that some election might be made, the leaders on each side agreed to the establishment by law of an Electoral Commission, to which should be referred all the disputed cases. The Commission was made to consist of five Senators, five Representatives, and five members of the Supreme Court. The Republican Senate elected to the Commission three Republicans and two Democrats; the Democratic House appointed three Democrats and two Republicans. So far there was a party tie. From the Supreme Court there were to be appointed, according to the law, two Republicans and two Democrats, and these four were to elect a fifth. Justice Davis, a liberal Republican, much inclined at this time in his party relations toward the Democrats, would probably have been elected as the fifteenth member of the Commission had he not just accepted an election to the United States Senate from the State of Illinois. This allowed the choice as the fifth

**The Electoral  
Commission  
of 1876.**

member of the Supreme Court to fall upon Justice Bradley, a Republican.

"This choice practically settled the result, for every vote given by the members of the Commission was a strict party vote. All the points in dispute were settled by a vote of eight to seven in favor of the returns transmitted by the Republican Electors in the four disputed States, and Mr. Hayes was accordingly declared elected by a majority of 185 electoral votes against 184."<sup>1</sup>

Mr. Tilden and the Democrats accepted the result, though there was much dissatisfaction and complaint. Some of the Democrats of the House attempted to prevent acquiescence in the result and the declaration of Hayes's election by a process of filibustering until after March 4th, but they were prevented from accomplishing their purpose by the decisions of the Speaker, Mr. Randall.<sup>2</sup> There was much excitement and uncertainty throughout the country and not a little danger of civil commotion, if not of civil war, so great was the party stake involved in the decision. The Constitution does not itself expressly provide for the settlement of such a dispute, but it vests in Congress the power to make provision by law. Of the two opposing contentions at the time, one held that the Constitution itself provided for the counting of the electoral votes, the other that the Constitution merely vests in Congress the power to provide by law for the count. The latter view is now generally accepted.<sup>3</sup>

Disputed  
Presidential  
Elections.  
Act of 1887.

V

The result of this dispute was the passage of an act,—though tardily passed ten years later, on February 3, 1887,

<sup>1</sup> See an article on "A Crisis in Our Country's History," *Century Magazine*, Nov., 1901.

<sup>2</sup> See page 277.

<sup>3</sup> Burgess, *Political Science*, vol. ii., pp. 228-229; *Congressional Record*, vol. xvii.

—providing a process of settling disputed presidential elections. The act is intended to provide against the recurrence of the danger of 1876. The act provides that the President of the Senate, in the presence of the two Houses, shall open the certificates of the electoral votes of the States in alphabetical order; these shall be handed to the tellers to be read; the President of the Senate shall call for objections, if any; these objections shall be in writing without argument, signed by at least one member from each House; when an objection is made, the Houses shall separate to consider and decide upon the objection; no electoral vote from any State may be rejected from which but one return has been received unless the two Houses acting separately so decide, and then the rejection is made by the concurrent resolution of both Houses when they again meet together. The time of casting the electoral vote is changed from the first Wednesday in December to the first Monday in January. This is for the purpose of allowing the excitement following the election to subside, and to give the States more time to settle any disputes which may arise. The electoral votes are to be counted by Congress on the second Wednesday in February. The act provides that tribunals appointed by and in each State shall determine what electoral votes from the State are legal votes, and the determination of the State tribunal shall be considered final. When there are two or more sets of tribunals in a State and they send in conflicting returns, that return shall be counted which the two Houses acting concurrently shall accept; when there is one State government and two returns are sent in, that one shall be counted which is supported by the Executive of the State, unless both Houses, acting separately, shall decide that it is not the lawful vote of the State. If the State has appointed no such tribunal, the two Houses of Congress shall determine which votes are legal, if two sets of returns ap-

pear. If the Houses differ, the vote of the State is lost. This throws the responsibility for the settlement of disputed elections within a State back upon the State itself. If a State does not settle its own dispute it runs the risk of losing its vote. It must settle its dispute in accordance with a law passed before the electors are chosen, and the decision must be made at least six days before the meeting of the electors. Congress can then not subvert the decision so reached, except in the cases described. Unfairness may be done in the State; but, as Mr. Bryce says, "unfairness is better than uncertainty," in such a case.<sup>1</sup>

Both the President and the Vice-President must be native-born citizens of the United States, thirty-five years of age, and have been for at least fourteen years residents within the United States. "Citizens of the United States at the time of the adoption of this Constitution" were made eligible. This was inserted in the Constitution out of regard for the great men like Hamilton and Wilson and others who, though not natives, had with patriotism and self-sacrifice aided in establishing our independence and in making our Constitution. "Native born" is interpreted to mean born within the jurisdiction of the United States. This may be on American vessels while in foreign ports, or in American embassies and consulates, all of which, by the principle of ex-territoriality, are considered as within the United States and under the jurisdiction of our laws. Therefore children born to our ambassadors, consuls, and

Qualifications  
of the  
President. X

<sup>1</sup> The bill proposed by Senator Morton, of Indiana, in 1875, provided that a concurrent vote of both Houses should be required to throw out a disputed return. In case of double returns from a State, that one should be counted which the two Houses, voting separately, decided to be the right one. In case the Houses failed to agree, the vote of the State was lost. The Democrats could have seated Tilden under this in 1876, as the votes of the four disputed States could not have been counted. See Stanwood's *History of the Presidency*, pp. 452-456. See, also, Burgess, *Political Science*, vol. ii., chap. iii., for a full and able discussion of the law of 1887.

naval officers while abroad are eligible to the offices of President and Vice-President. The same is true of children born to American citizens while travelling or sojourning in foreign countries. An American does not lose his citizenship by travelling or by a temporary residence abroad. The full rights of citizenship descend to the children, whether born at home or abroad. On the other hand, children born in America to foreign representatives, "extra-territorial persons," would not be eligible. Whether a natural-born citizen who afterwards became a naturalized citizen of another country would be eligible to the Presidency is a question. He probably would not be, as the President must be a citizen as well as native-born. "The President is the representative of the interests of the country against foreign countries. His entire interests should be with his own country."<sup>1</sup>

"The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States" or from any State.<sup>2</sup> The salary, formerly twenty-five thousand dollars, is now fifty thousand dollars a year, together with the use of the White House.

The person of the President is inviolable. "He cannot be arrested, or restrained of his personal liberty by anybody for anything, not even for the commission of murder. He is responsible only to the Senate by impeachment. During his impeachment trial he cannot be arrested, or in any manner restrained, nor forced to appear in person before the tribunal, nor to give testimony, nor be deprived of any of his powers as President. Such are the postulates of political science which the Constitution im-

**The  
President is  
Exempt  
from Legal  
Process.**

<sup>1</sup> Burgess, *Political Science and Constitutional Law*, vol. ii., p. 242.

<sup>2</sup> Constitution, Art. II., Sec. 1, Cl. 7.

plies. It is impossible to make the supreme executive head of the government subject to process without ultimately destroying all power to execute process,—*i. e.*, without disorganizing the Government. It is impossible to make the executive head of the Government of the United States subject to process without destroying the unity of the executive power, without placing a part of the power to execute the laws under the control of some other person than the President; and this the Constitution forbids, in that it vests the whole executive power in the President. It is impossible to execute any process upon the President of the United States should he resist it, for the Constitution makes the whole machinery of execution subject ultimately to his command. Moreover, the Constitution vests in the President the unlimited power of pardon, except for impeachment. He could, therefore, if made subject to the ordinary process of law, free himself by pardoning himself.<sup>1</sup>

This exemption from process of the Courts is only temporary, the right of prosecution is only suspended. Upon his retirement or removal from office, the ex-President becomes immediately liable to prosecution and punishment for every crime committed while in office.

The President is removable only by impeachment. In case of his removal by impeachment, or in case of his death, resignation, or inability to discharge the duties and powers of his office, the Vice-President becomes President. The Vice-President is chosen in the same way as the President, and his qualifications are the same.

The Vice-President has but two functions,—to preside over the Senate and, in the constitutional emergency, to succeed to the Presidency. He does not appoint the committees; they are elected by the Senate. He is not a member of the Senate, and cannot vote except to give a casting vote in case of a tie.

The Vice-  
President.

Functions of  
the Vice-  
President.

<sup>1</sup> Burgess, *Political Science*, vol. ii., pp. 245-246.

Politically, the office of Vice-President is of but little importance, and it has been said that to elect a capable man to the Vice-Presidency is merely to retire him into "harmless and innocuous obscurity." The party conventions in making nominations to this office generally use the place to placate a defeated faction in the contest for the presidential nomination, or to bring on to the ticket a representative of a certain section of the country other than that of the presidential nominee. The ability and public record of the nominee are not duly considered, and the result is that obscure and second-rate men are apt to be nominated for Vice-President.<sup>1</sup> The office is an important one in its possibility, and no man that the party and the country are not willing to have for President should ever be named for Vice-President. Five times in our history the President has died in office, and the Vice-

Vice-  
Presidents  
Succeeding  
to the  
Presidency.

President has succeeded to his place. Tyler took the elder Harrison's place in 1841; Fillmore succeeded to Taylor in 1850, Johnson to Lincoln in 1865, Arthur to Garfield in 1881, and Roosevelt to McKinley in 1901. In each of two cases,—of Tyler and Johnson,—the succeeding Vice-President seriously disappointed and disrupted his party. To "Tylerize" or to "Johnsonize" is to desert the party that elevated one to his office. But this should not be understood to mean that Tyler and Johnson were political apostates, that they had deserted their principles. Tyler had never been a Whig, nor Johnson a Republican. The Whigs, without publishing a platform of principles, took up Tyler in 1840, because he had broken with Jackson and the regular Democrats. Tyler was a representative of the extreme States' rights Democracy of the South who had resigned his Senatorship rather than obey the instructions of the Virginia legislature to support Jackson. The Whigs wished to attach the Tylerites to the support

<sup>1</sup> See Bryce, vol. i., p. 300.



of Harrison. "Translated into the terms of the politics of continental Europe, the Whig ticket represented a union of the right and the extreme left against the centre."<sup>1</sup> In 1864, the Republicans put Johnson, a Democratic Unionist of the South on their ticket, in order to make their party a *national-union* party, to avoid the charge of sectionalism, and to draw Middle-State support. When these two men came to the chief office they inevitably disappointed the main body of the men who had elected them. Party tickets are not now so incongruous. Yet even in late years it has been thought "good politics" to go so far in bidding for support or in placating a defeated faction as to place upon the ticket for Vice-President a candidate who on public policies and in political tendencies differs very materially from his party chief. When party managers nominate a Vice-President, they must be ready for the utmost possible. The men who defeated General Grant and nominated Garfield did not expect to make Mr. Conkling's first lieutenant (Arthur) President of the United States. If Mr. Cleveland had died, either Mr. Hendricks or Mr. Stevenson would have reversed his financial policy. The clever gentlemen who planned to shelve Mr. Roosevelt by placing him where he could not circumvent their schemes did not know what fate had in store. President Roosevelt, who has lately succeeded to his high office under such direful circumstances, stood in complete party and public accord with his predecessor. His nomination to the Vice-Presidency, one of the most fitting ever made, exemplifies very fully his own characterization of the office:

"The Vice-President should, so far as possible, represent the same views and principles which have secured the nomination and election of the President, and he should be a man

<sup>1</sup> Theodore Roosevelt, *American Ideals*, p. 228; *Review of Reviews*, Sept., 1896.

standing well in the councils of the party, trusted by his fellow party leaders and able in the event of an accident to his chief to take up the work of the latter just where it was left. . . . One sure way to secure this desired result would undoubtedly be to increase the power of the Vice-President. He should always be a man who would be consulted by the President on every great party question. It would be very well if he were given a seat in the Cabinet. It might be well if, in addition to his vote in the Senate in the event of a tie, he should be given a vote, on ordinary occasions, and perchance on occasions a voice in the debates."<sup>1</sup>

The Vice-President under Mr. Roosevelt is his Secretary of State,<sup>2</sup> but in case of his re-election there would be nothing in the way of his calling his elected Vice-President to a seat in his Cabinet councils. John Adams, a man of energy and action, complained of the office of Vice-President while he held it as one wholly insignificant, "the only situation in the world where firmness and patience were useless," yet he was consulted by Washington in many of the most important measures of State, in the same manner as were the heads of departments.<sup>3</sup>

A vacancy in the presidential office may occur in several ways: (a) By death. (b) By impeachment. (c) By resignation. The President may resign at discretion. He would address his resignation to Congress. The evidence of resignation is his letter "delivered into the office of the Secretary of State."<sup>4</sup>

(d) By inability to discharge the duties and powers of the office. No one is authorized to determine when

<sup>1</sup> *American Ideals*, pp. 231-232.

<sup>2</sup> By "Vice-President" here I mean the one who would stand instead of the President in case of the latter's death or disability. not the Senator who, as President *pro tem.* of the Senate, performs the Vice-President's chief function of presiding over the Senate.

<sup>3</sup> Adams's *Works*, vol. ix., p. 573; Lolabel House's *Twelfth Amendment*, p. 38. The influence of the Twelfth Amendment in affecting the incumbent of the Vice-Presidential office is thoughtfully considered in this thesis.

<sup>4</sup> Statutes, Act of 1792, March 1.

disability exists. Professor Burgess suggests that this should have been left to the two Houses.<sup>1</sup> In 1881, President Garfield lay at the point of death for more than two months, quite unable to perform the duties of his office. Vice-President Arthur did not succeed to the office during this inability of the President; if he had claimed the right to do so and the claim had been tested in law there might have been difficulty and embarrassment. The secretaries of President Garfield conducted the Executive office.

(e) By refusal of the newly elected President to accept the office. This has never occurred and is not apt to occur.

In case a Vice-President who may have succeeded to the Presidency should die (which has never happened), it was formerly provided (by a law of 1792, not by the Constitution) that the President *pro tem.* of the Senate should succeed to the place as acting President. Failing the President *pro tem.* of the Senate, the Speaker of the House succeeded. There were three objections to this: 1. If the President and Vice-President should both die during the interim between the expiration of one Congress and the meeting of the next, there might be no President of the Senate and there certainly would be no Speaker of the House. 2. If the Presidency were filled by either of these officers, it would be placing a member of the legislative department in the executive chair. Thus the Executive would be chosen by the legislative department and he would feel his dependence on them. Even this temporary subordination of the Executive to the Legislative would be contrary to the spirit and purpose of independent and co-ordinate branches of government. 3. By this system of succession, a President of the Senate or a Speaker of the House of a different party from the chosen President

The  
Presidential  
Succession  
Act of 1836.

<sup>1</sup> Vol. ii., p. 24.

and Vice-President might come into power. This might lead to a reversal of the policies voted for by the people. For these reasons and in order to make sure that not even a temporary vacancy should exist in the office of President, the *Presidential Succession Bill* was enacted in 1886, providing that in case of the death both of the President and Vice-President the Cabinet officers shall succeed to the Presidency in the following order:<sup>1</sup>

1. Secretary of State.
2. Secretary of the Treasury.
3. Secretary of War.
4. Attorney-General.
5. Postmaster-General.
6. Secretary of the Navy.
7. Secretary of the Interior.

These Cabinet officers, of course, before they can be eligible to the succession, must possess all the constitutional qualifications. When the President or Vice-President again become qualified the Cabinet officer acting is dispossessed.

The powers and duties of the President may be classified as follows:

**Classes of Presidential Duties.**  
 1. **Purely Executive.** 1. *Purely Executive.*—These include: (a) his power to appoint executive officers; (b) his power "to take care that all laws be faithfully executed." He is enabled to do this by his authority to commission all the officers of the United States, to appoint to executive offices and to fill vacancies, and by his authority as commander-in-chief of the army and navy. Executive departments are created to aid him and to represent him in thousands of acts to which his personal attention cannot be called.

This duty is not limited merely to the enforcement of acts of Congress and of treaties, but it includes "the rights,

<sup>1</sup> This order is the order of the creation of the departments. The Secretaries of Agriculture and of Labor and Commerce, Cabinet posts created since the passage of the Presidential Succession Bill, have not been legally empowered to succeed to the Presidency.

duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the Government under the Constitution."<sup>1</sup>

2. *Diplomatic*.—These include: (a) his power to make treaties, by and with the advice and consent of the Senate; (b) the power to appoint ambassadors, consuls, and other commissioners and representatives of the nation to foreign countries provided for by law; (c) the power to receive foreign ambassadors and representatives.

2. *Diplomatic.*

3. *Advisory*.—The advisory powers of the President consist in his power and duty: (a) to recommend measures to Congress; (b) to inform Congress on public questions and on the state of the Union.

3. *Advisory Duties.*

His annual message to Congress submitted at the opening of the regular session, the first Monday in every December, is the means by which he performs these functions. He may at any time also submit a special message urging on Congress a particular course in legislation.

4. *Legislative*.—The President's legislative powers are: (a) the power to convene both Houses of Congress in extraordinary session; (b) the veto power. This is a negative power; it is not a power to legislate, but to prevent legislation; (c) the treaty-making power, since treaties are the "supreme law of the land."

4. *Legislative Functions of the President.*

5. *Military*.—The military power of the President consists in his being commander-in-chief of the National army and navy, and of the militia of the several States when called into the service of the United States. His war power makes the President a commanding figure.\* By the Act of Feb-

5. *Military Power of the President.*

<sup>1</sup> *In re Neagle* United States Reports, 135. *Boyd's Cases*, p. 332.

\* See p. 176 for discussion of the war power of the President.

ruary 28, 1795, the President is authorized to call forth the militia of the States, through their officers, in order to suppress insurrection, or to repel invasion, and the President is to judge of the emergency; to subject the militia to the President's command and to martial law and punishment. These conferred powers have been sustained by the Court.<sup>1</sup> The nation, through the President, controls the State militia in a military emergency, leaving to the States only the appointment of the officers and the training of the militia according to the discipline prescribed by Congress.

6. *Judicial*.—The President exercises judicial power, or, at least, power over the Judiciary, when he appoints the judges of the Supreme Court and all the inferior federal judicial officers.

In this classification, the powers of the President are not intended to be strictly defined. It will be noticed that some of the presidential powers may fall in two, or more, of the classes named. For instance, when the President makes a treaty he exercises not only diplomatic power but legislative power also, and when he appoints a judge he performs a purely executive act with a judicial bearing.

Of these various powers so classified a few need to be treated at some length.

By his power to call Congress into extraordinary session and to communicate his message, the President may take the initiative in legislation. It would be legal for him to construct and present regular bills to Congress; but he does not do this formally through his executive departments, because our usage and laws do not provide executive organs for "presenting, explaining, defending, and managing government bills in Congress."<sup>2</sup> This custom might have

<sup>1</sup> See *Houston vs. Moore*, 5 Wheaton, 1; *Martin vs. Mott*, 12 Wheaton, 19.

<sup>2</sup> Burgess, *Political Science*, vol. ii., p. 254.

grown up under our Constitution, but it has not happened so. If Hamilton, in defending his financial measures before Congress in 1790, had appeared in person instead of sending a written report, it is conceivable that the precedent might have been followed, and the Cabinet ministers might have been allowed the privilege of defending their measures on the floor of either House. As it is, they rely now, for the promotion of their measures, on their written reports and public recommendations, on private conferences with the committees, and on personal conferences and influence with the party and committee leaders of the houses. Certain Congressional leaders become, in a way, the spokesmen for the executive policy, and through them the President exercises great influence in legislation. This informal private contact with Congress is often more effective than the legal and more public process would be. Very frequently the public message of the President, after being respectfully read and printed, is given no further attention, while Congress pursues its own course. Especially is this likely to be the case if the Congress is in party opposition to the President.<sup>1</sup>

The Constitution permits the President to veto a bill by returning it, with his objections, to the House in which it originated. If the bill upon reconsideration is not again passed by a two-thirds vote of each House it fails to become a law.

The  
Presidential  
Veto.

If it is so passed it becomes a law despite the veto. A two-thirds vote of each House means two thirds of a quorum, not two thirds of all the members elected to the body, the members always being required in such cases to go upon record by a Yea and Nay vote entered upon the Journals. This gives the President large legislative power; for, while he may not be able by means of the veto to secure the passage of laws which he likes, he may prevent the passage of those which he dislikes. If

<sup>1</sup> See also p. 302 in the chapter on the House of Representatives.

any bill be not returned by the President within ten days (Sundays excepted) after it shall have been presented to him, it becomes a law just as if he had signed it, unless Congress by adjournment prevents its return, in which case it shall not be a law. This gives the President a chance to defeat a bill by what is called the "Pocket veto." The "pocket veto" can operate only in the case of bills sent to the President within ten days of Congressional adjournment. If he retain such a bill (figuratively, in his pocket), neither giving it his sanction by signing it, nor withholding his sanction in returning it to Congress, the bill is defeated. The President is not bound to give reasons for defeating a bill by a pocket veto which he has not had at least ten days to consider. In a regular veto he is bound to give such reasons. The President employs the "pocket veto" rather than the direct veto, either because he may not have time to prepare his veto message giving his public reasons against the measure, or because he may not wish to give Congress a chance to pass the bill over his head, or does not wish to allow his reasons against the bill to go upon record, together with the speeches and criticisms against these reasons; that is, he may not wish to join issue before the public with the Congressional advocates of the bill,—which might furnish campaign material for his opponents. The latter reason would operate, evidently, only when the President feels that his side of the case is weak before the country. The only way of offering public criticism of a President for a pocket veto is through the public press. In 1864, when President Lincoln defeated by a pocket veto the Reconstruction measure known as the "Wade-Davis plan," Senator Wade of Ohio, and Representative Davis of Maryland, the authors of the bill, united in a public criticism of the President in the public prints. This called out from President Lincoln a defence of his action. A pocket



veto does not always signify, by any means, that the veto is without good public reasons.

In each of the thirteen Colonies the governor could veto any measure of the legislature; and in each of the Colonies, except proprietary Maryland and the charter Colonies of Rhode Island and Connecticut, the king could prevent a bill from be-

The Veto  
in the  
Colonies.

coming a law, even after it had been approved by the governor; and in all cases where the veto was exercised it was absolute.<sup>1</sup> The king of his own right, or through the royal government, had used the veto so repeatedly and so much to the vexation of the colonists, "refusing his assent to laws the most wholesome and necessary for the public good, forbidding his governors to pass laws of immediate and pressing importance,"<sup>2</sup> that when the Colonies came to make State constitutions only one State, Massachusetts, allowed the veto power to its governor.<sup>3</sup> In later State constitutions, the governor's veto has been revived. The New York Constitution of 1777 allowed the veto to a *council*, consisting of the governor and the Supreme Court judges. The royal veto was more direct and frequent in the Crown Colonies than in the others; but its use as

The Royal  
Veto in the  
Colonies.

against colonial legislation made the veto a real power to the colonists, while George III., in his attempt to revive the royal power in England, specifically refused to recognize the lapse of the royal veto in America. Thus a real veto power was "a fully recognized legal right down to the outbreak of the American Revolution, and naturally passed into the constitutional law of the States and the American nation."<sup>4</sup> Under the Confederation there was,

<sup>1</sup> Mason's *Veto Power*, p. 17.

<sup>2</sup> Declaration of Independence.

<sup>3</sup> Alex. Johnston Lalor's *Cyclopedia of U. S. History and Political Science*, art. on "Veto," Hildreth, vol. iii., p. 377.

<sup>4</sup> Stevens, *Sources of the Constitution*, p. 158. See also pp. 27, 156, 157 of this valuable work.

of course, no executive veto because there was no Executive. In the Constitutional Convention of 1787, the Virginia Plan proposed to give the veto to the Executive "and a convenient number of the national judiciary," unless overridden by a preponderant number of each branch. The Judiciary was afterwards cut off from participating in the veto from the feeling that the judges should not pass on the law in the making,—should not be a part of the lawmaking body,—for when they came to judge the laws they would have a bias in their favor. It was desired also to keep the judges apart from executive influence. Hamilton and Wilson urged an absolute veto, in the belief that though it would be seldom or never used, it would serve to prevent rash legislation, but this was rejected by the States unanimously. Some thought the President should have no negative at all, that he would be no wiser than the Senators, while Dr. Franklin proposed that the Executive be allowed to suspend a legislative act for a while, but not to defeat it entirely.

The veto power gives the American President much greater weight in legislation than the English king can exercise. In England, the royal veto power is obsolete; the veto has not been exercised there since 1707,<sup>1</sup> now nearly two hundred years ago, though George III. claimed, but did not exercise, the right. It has been said the king would be bound to sign his own death-warrant if such a measure were sent up to him. In the theory of the English Constitution the king is a part of Parliament. "The King in Parliament" is the historic expression to indicate the whole legislature of the realm. As a part of Parliament the king is presumed by one of the fictions of the Constitution to have given his consent to whatever passes that body, although the

<sup>1</sup> When Queen Anne vetoed the Scotch Militia bill.

The  
Judiciary  
and the Veto.  
Proposals  
in the Con-  
stitutional  
Convention,  
1787.

The Royal  
Veto To-Day-

king never appears in Parliament except by his ministers, unless it be to open or dissolve that body in a speech from the throne. The real Executive in England—the Ministry—sit in Parliament and urge and secure the passage of measures. Our President cannot do this. The veto which he exercises implies a power outside of the legislature. The people have bestowed this power upon the President as an individual agent for the purpose of checking hasty and ill-advised legislation, to protect the nation against abuses of legislative power.

The veto power was but little used by the early Presidents. Washington vetoed but two bills; his successors down to 1830 vetoed but seven. Jackson marked an epoch in the use of the veto. The earlier view was that the veto power was al-

Veto: How  
Used by the  
Presidents.

lowed by the Convention of 1787 for the purpose of protecting the Constitution and the Executive department from legislative encroachment. The President should see that no measure is passed that clearly violates the Constitution, or that would interfere with the independence of his office. Within these limits Congress was expected to determine the public policy to be marked out by legislation. The President was not to interfere with the making of the laws except for clearly defined constitutional reasons. The early Presidents up to Jackson's time, as we have seen, acted upon this theory of the veto. But Jackson used his veto to defeat, not merely measures that contravened the Constitution, but also to defeat measures that contravened his personal and party policy. If a measure appeared to him unwise and inexpedient he thought he should use the veto power to defeat it. The President was to share with Congress the responsibility for legislation; the presumption in favor of a measure merely because Congress had passed it was not to weigh decisively with the President. This seemed to Clay and Webster and other opponents of Jackson a

dangerous assumption of executive power, in opposition to the spirit of the Constitution. Since Jackson's time, however, the veto has been used upon the theory which he exemplified,—to defeat any measure which the President may deem pernicious or impolitic. President Cleveland vetoed over three hundred private pension bills, and President Johnson, during the struggles on Reconstruction, used the veto constantly against important measures of Congress in their plan of Reconstruction. The two-thirds majority, however, against Johnson were able to pass all desired measures over his veto; and the Presidency, raised to such heights of power under Jackson and Lincoln, sank under Johnson to the lowest degree of political importance,—so much so that Johnson's period has been spoken of as marking the "degradation of the Presidency."

Thus the veto in America, against a mere majority in Congress, has come to be a real power, while in England it has come to be only a nominal one, illustrating, as Mr. Bryce expresses it, "the tendency of unwritten or flexible constitutions to depart from, and of written or rigid constitutions to cleave to the letter of the law." That is, while in both countries the theory of the veto is the same,—“whereas it is now the undoubted duty of an English king to assent to every bill passed by both Houses of Parliament, however strongly he may personally disapprove its provisions, it is no less the undoubted duty of an American President to exercise his independent judgment on every bill, not sheltering himself under the representatives of the people, or foregoing his own opinion at their bidding.”<sup>1</sup> The decline of the veto power in England, is due, first, to the decline in the power of the sovereign, and, second, to the fact that, generally, since the Revolution of 1688, the Crown has acted only on the advice of responsible ministers.

**The Veto and  
Written  
Constitutions.**

<sup>1</sup> Bryce's *American Commonwealth*, vol. i., p. 60.

In America the people vest more power in one man than in England, where the government is more that of a representative body. Or, we may say, that in America the people appoint a popular representative, the President, to restrain their popular representatives in Congress; from which it appears that the people are not quite willing to trust themselves to the government of their own representatives in a single body. This leads to conflicts and deadlocks between the two branches of the Government and to consequent governmental inertia and inability to act, as the people have no immediate and direct means of deciding in a dispute between the two branches of their Government.

**Decline of  
the Veto in  
England.**

It would seem that under representative government in such cases power should be lodged in the representative body. For this reason the question has been repeatedly raised whether the veto power is desirable; whether it can be reconciled with popular government; whether it would not be well to limit, or abolish it. Jackson's unprecedented use of the veto, followed by its similar use by Tyler in the defeat of the bank charters and other Whig measures, gave rise to party, if not popular, opposition to the veto, and from 1832 to 1843 frequent propositions were made to limit this power by allowing a majority of all the members of each House instead of two thirds of a quorum, to repass a vetoed measure. One of the most notable propositions in this direction was that of Henry Clay, January 24, 1842, who proposed a constitutional amendment providing that the veto of the President might be overruled by a second majority vote of the two Houses. In behalf of such a proposition as Clay's, it may be noticed that today, with a Senate of ninety members, and a House of, approximately, four hundred (386) members, it might require forty-six votes in the Senate and two hundred and one

**Popular  
Opposition  
to the Veto.**

X

**The  
Whig  
Opposition.**

**Clay on  
the Veto.**

in the House to pass a measure. If the President then vetoes it, it will require fourteen more Senators and sixty-five more Representatives to pass the measure against him. Thus the veto in the hands of the President makes him equal, in his power over legislation, to sixty-five Representatives and fourteen Senators, or to seventy-nine representatives of the people and the States. This considers merely his numerical weight and disregards entirely his influence from appointments and from the prestige and *éclat* of his office. Mr. Clay saw that the veto, as Jackson and Tyler wielded it, had become a greater power than the framers of the Constitution had ever intended; that, whereas it had been given to protect the Constitution and to defend the Executive from legislative encroachment, it was now being used to defeat party policies approved by the people; and that, owing to the extreme difficulty of mustering two-thirds votes in both Houses against a President, the veto had practically become absolute. Clay warned the country that, if the veto power was not arrested, or limited, the time would come when the whole legislation of the country would be prepared at the White House and would come down to Congress in the shape of bills to be registered. Then "the question that Congress would have to decide would be, not what is the proper remedy for the existing grievances of the country, not what will restore the national prospects; no, but what measures will be sanctioned by the chief magistrate. The question was the old one, whether we should have in this country a power tyrannical, despotic, absolute, the exercise of which must, sooner or later, produce an absolute despotism; or a free representative government with powers clearly defined and carefully separated."<sup>1</sup> One of the duties which the Whig

<sup>1</sup> Cited in H. C. Lockwood's *The Abolition of the Presidency*, p. 90. In this volume Mr. Lockwood advocates the reduction of the presidential office to purely ministerial functions and the government of the country by

party felt itself called upon to perform, "conspicuously and prominently above all others," was "a reduction of the Executive power by a further limitation of the veto so as to secure obedience to the public will as expressed by the immediate representatives of the people and the States, with no other control than that which is indispensable to avert hasty or unconstitutional legislation."<sup>1</sup> The Whigs proposed to place upon their party banner, "The will of the people uncontrolled by the will of one man."

But these proposals to reduce the veto came to nothing. After the passing of the party issues of the time and after the control of the presidential office through popular party machinery, all agitation in this direction ceased.

On the other hand, proposals have been made for the extension of the Executive veto and for more frequent application of its use. It has been proposed to require two thirds of all the members elect to each House instead of two thirds of a quorum, to avail against the President; also, to allow the President to veto single items in an Appropriation Bill without having to defeat the whole bill containing appropriations necessary for carrying on the Government.<sup>2</sup> The latter demand has arisen from a desire to enable the President to defeat grants for purely local purposes inserted by Congressional jobbery and log-rolling. This would materially increase the power of the veto and "practically destroy the only power which Congress has over the President apart from impeachment." But, as a remedy against a representative assembly of the two Houses of Congress. The abolition of the veto would be a necessary step to accomplish this. See also Clay's *Works*, edited by Colton, vol. vi., p. 318.

Proposals  
to Limit  
the Veto.

<sup>1</sup> Address to the People by Whig Members of Congress, *Niles's Register*, vol. lxi., p. 36, Sept. 3, 1841. See also Benton's *Thirty Years' View*, vol. ii.

<sup>2</sup> See the topic, "Riders."

<sup>3</sup> Mason's *Veto Power*, p. 138.

log-rolling jobs, and raids on the treasury, it might prove effectual.

X      The signature of the President is not essential to the passage of a constitutional amendment. In 1794, objection was made that the Eleventh Amendment had not been constitutionally adopted, because it had not been presented to the President for approval. Neither had this been done in the case of the first ten amendments. It was argued, in defence of adding amendments without the assent of the President, that an amendment is a substantive act, an act in Constitution-making, and it does not come within the provisions of the Constitution investing the President with a negative. The Supreme Court unanimously sustained this view and declared the amendment a part of the Constitution.<sup>1</sup> However, the proposed Douglas amendment guaranteeing slavery against congressional interference was sent to President Buchanan, who approved it, March 2, 1861; and the Thirteenth Amendment was presented to President Lincoln, who signed it, and notified Congress to that effect, whereupon the Senate immediately passed a resolution declaring that the President's signature was not necessary.<sup>2</sup>

✓      While the President's signature is essential to make effectual a *Joint Resolution* it is not necessary to the operation of a *Concurrent Resolution*. A *Concurrent Resolution* has not the effect of law, but is merely an expression and an announcement to the country of the sense of Congress, a statement of the opinion of Congress upon a public question or of the policy that body would like to pursue. It is used instead of a *Joint Resolution* or a bill, because of the known hostility of the President; or on matters on which Con-

<sup>1</sup> See Hollingsworth *vs.* Virginia; Hinsdale's *American Government*, p. 192.

<sup>2</sup> Mason's *Veto Power*, pp. 117-118.



gress wishes to establish a precedent by the public record, or, in a measure, to pledge the public conduct. The famous Mathews Concurrent Resolution of 1878, by which Congress sought to put the country on record in favor of the restoration and continued use of the silver dollar, is a case in point. In February, 1865, Congress sent to President Lincoln a *Joint* Resolution declaring that certain States were not entitled to Presidential electors, because they were then in rebellion against the Government. President Lincoln signed the resolution, but sent a message to Congress declaring this unnecessary, as the two Houses had exclusive authority under the Constitution to count the electoral votes. This was the business of Congress. In March, 1866, in general harmony with this view, the two Houses passed a *Concurrent* Resolution declaring that no Senator or Representative should be admitted into either branch of Congress from any of the eleven States then considered in rebellion until the consent of Congress was obtained. President Johnson was not asked to approve this resolution.<sup>1</sup>

The form of a Joint Resolution, adopted in Congress February 25, 1871, was instituted for the purpose of a temporary enactment as distinguished from a permanent statute. There is no difference between a bill and a joint resolution so far as the purpose is concerned. It differs in phraseology from the enacting clause of a bill and this is the only difference that can be noted. It has to go through all the processes and stages of legislation that a bill does and then has the same force of law. It must be read as many times and must have the signature of the President. There is no reason for its existence, as all bills and legislation should have the same enacting clause.<sup>2</sup>

<sup>1</sup> Hinsdale's *American Government*, p. 192.

<sup>2</sup> See remarks of Senator Hamlin of Maine, and Senator Sumner of Massachusetts, in Senate, Jan. 27, 1871. See Blaine's *Twenty Years of Congress*; McKee's *Manual of Congressional Practice*, pp. 124, 126.

President Grant on August 15, 1876, vetoed a bill for the sale of certain Indian lands. He sent his veto message to the Senate, but before that body had acted upon it a message was received from the President, saying that his veto was premature, and he requested that the bill be returned to him that he might sign it. A discussion arose as to whether the President could recall a veto message. It was generally held that the President had no such power, and the only effect of the second message was to induce the passage of the bill over the veto.<sup>1</sup>

Though the Senate is co-ordinate in power with the President in treaty-making, and though certain topics relating to this theme pertain to the Senate and House, it seems best to explain here the various factors and functions of the treaty-making power of our Government.

The Constitution says: The President "shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."<sup>2</sup> "Two-thirds of the Senators present" may be a minority of the whole Senate. This provision does not mean, as practice has interpreted it in the case of appointments, that the Senate can advise only by saying Yes or No to a treaty. While the practice has usually been for the Presidents to ask for the "advice" of the Senate only when they ask its "consent" to a completed treaty, yet it is perfectly proper and constitutional for a

President to ask the advice of the Senate before opening or completing negotiations, as Washington frequently did, and as Polk did in the Oregon Treaty of 1846. The Senate may advise by proposing amendments, or it may request the President to open negotiations for certain treaty purposes, or advise him not to begin negotiations of a certain kind,

<sup>1</sup> Mason, p. 118.

<sup>2</sup> Art. II., Sec. 2, Cl. 2.

though the President would not be under obligations to act on such requests. The initiative in making a treaty is with the President, because he has power to appoint and receive ambassadors, and he may complete negotiations with a foreign power—always through his Secretary of State—before communicating any of the proceedings to the Senate. He is not bound to take the Senate into his confidence in the process of his negotiations. But since the Senate can block his negotiations after they are communicated, or defeat his treaty after it is made, the President will naturally desire the favor and co-operation of the senatorial majority, and especially of the Committee on Foreign Relations.

In 1870, Senator Sumner, Chairman of the Committee on Foreign Affairs in the Senate, opposed and succeeded in defeating President Grant's treaty for the annexation of San Domingo. In 1898, President McKinley sent Senator Davis of Minnesota, Chairman of the Senate Committee on Foreign Affairs, as one of our Commissioners to Paris to negotiate the Peace Treaty with Spain. Naturally, Senator Davis would defend the completed treaty on the floor of the Senate, and his Republican colleagues, who placed him in his responsible position, would be inclined to sustain him. In 1890, President Harrison did not take decisive steps during our strained relations with Chile until he had sought the judgment and co-operation of the Chairmen of the Foreign Affairs Committees in both Senate and House. Mr. Blount of Georgia, a Democrat, was Chairman of the House Committee on Foreign Affairs, but he and President Harrison, a Republican, were acting in complete harmony and with a mutual understanding.

The treaty-making power thus conferred upon the President makes him a diplomatic officer. He directs our diplomacy. Through his Secretary of State he represents the nation in its relations with foreign powers

The Executive Seeks  
Senatorial  
Co-operation.

*unfavorable*

and controls our foreign policy. But, as we have indicated, the President has not a "free hand" to do as he will in our foreign relations. He cannot declare war, of course, for that power belongs to Congress, but he may by his negotiations or by his executive orders so entangle us in a foreign complication that it may be very difficult if not impossible for Congress to refuse a declaration of war.

In 1846, preceding the Mexican War, President Polk ordered our troops into disputed territory, where they were attacked by the Mexicans; Congress then

✓  
The  
President  
may Bring  
on a War.

merely declared that "war existed by the act of the Republic of Mexico." A President also may prolong a war by refusing to negotiate, or he may speedily end one by protocol if he be so inclined. But in either policy the President finds a check against him in Congress. If he negotiates too soon or adversely to the national interest the Senate may refuse to confirm the treaty; and if he be disposed to prolong the war unnecessarily and against the national desire, Congress may refuse money for the conduct of the war. The President, therefore, in any international struggle or negotiation of moment will always seek the co-operation of the congressional branch of the Government.

Although the House may not participate in the conduct of foreign affairs, its power of withholding appropriations would be effective in embarrassing, or even in defeating, the Administration, if the party majority there chose to antagonize the President. It is by all means desirable that our Government in a controversy with a foreign power should act unitedly. If the different departments of the Government pull apart and come to loggerheads in a foreign contention, it is not probable the Government will be able to carry its point. It is for this reason that, in any grave crisis, the President will not be apt to take any decisive step until he knows that he will be sustained

✓  
The Need of  
Unity and  
Harmony in  
Foreign  
Relations.

by the agreement and concurrence of those who are authorized to speak for the two Houses.

It has been said that the House cannot participate in the conduct of foreign affairs. That the House is not to be considered as a part of the treaty-making organ of the Government was settled by the precedent established in the discussions over Jay's Treaty,—one of the most famous treaties in our history. The points then brought into discussion are of great importance in the consideration of this subject. Jay's Treaty was negotiated in November, 1794, but it was not received at Washington until after the adjournment of Congress in March, 1795. Washington submitted the treaty to the Senate in a special session of that body summoned for that purpose, and the treaty was ratified, after a two-weeks secret debate, on June 24, 1795. The vote stood twenty to ten, exactly the two thirds necessary for ratification. When the treaty became public it excited the fiercest popular opposition. This opposition was represented in the lower House of Congress, where the Jeffersonian Republicans, who were hostile to the treaty, had a majority, and a struggle there over the treaty was inevitable.

To What Extent may the House of Representatives Participate in the Treaty Power?

X

On March 2, 1796, President Washington proclaimed the treaty the law of the land and communicated it to the House in order that the necessary appropriation might be made to carry it into effect. On the day of this communication from the President, Edward Livingston, of New York, a Republican leader, offered a resolution in the House calling on the President for Jay's instructions and other papers relating to the treaty. A notable debate occurred on this resolution, and Albert Gallatin, the ablest Republican leader of the House, made one of his two great speeches which Jefferson pronounced the best commentary ever published on the treaty-making clauses of the

Discussion on Jay's Treaty.

Gallatin on the Treaty Power.

Constitution. Gallatin defended the right of the House to use its discretion in providing for the carrying out of this treaty,—that the House could review the merits and desirability of the treaty, and was not bound to carry it out merely because it had been agreed to by the President and the Senate. The House was competent to look into the papers, as it had a right to do, and see the public reasons for the treaty and the methods of its negotiation.

“Gallatin did not claim on the part of the House an absolute right of review in every instance of negotiation, but that whenever the President and Senate include in a treaty matters confided by the Constitution to the whole Congress of the United States, an act of legislation will be necessary to confirm these articles; this act the House, as a co-ordinate branch of Congress, is perfectly competent to pass or reject at discretion, and that thus the absorption of legislative powers by the treaty-making organ will be obviated.”<sup>1</sup>

The Constitution, and treaties made in accordance with it, are the supreme law of the land. In saying this, the Constitution did not intend to place treaty law above congressional law, or to compare these different kinds of national law with one another; but the intention was to declare whether “the constitutional laws and treaties of the General Government, or the laws and constitutions of the States are supreme, in case of clashing powers.”<sup>2</sup>

It was understood that the Jay Treaty contained provisions touching the regulation of commerce known to be in opposition to the will of the House. These provisions were inserted in the treaty on the recommendation of Hamilton with the express design of making laws by the more convenient combination of President and Senate instead of President and the whole Congress. Gallatin and the Republicans held that they had a right to pre-

<sup>1</sup> Schouler, *History of the United States*, vol. i., p. 309.

<sup>2</sup> Gallatin.

vent this, and their position, especially since there was no precedent in such a case, cannot be said to have been unreasonable. The House passed the Livingston resolution by a large majority, calling upon the President for the papers. But Washington refused to submit the papers to the House because, as a matter of precedent, he did not wish to acknowledge that the assent of the House was necessary to the validity and execution of a treaty. The House, after discussing the President's reply, receded from its position in this particular case and passed the laws and appropriation necessary for carrying the treaty into effect. It, however, resolved that while it claimed no agency in the making of treaties, that power being exclusively with the President and Senate, yet, as a part of Congress, it claimed the right of deliberating upon the expediency or in expediency of carrying into effect a treaty which must depend for its execution on laws to be passed by Congress, or that deals with subjects, like the regulation of commerce, which had been given by the Constitution to the control of Congress; and that the House might act in such cases as, in its judgment, might seem most conducive to the public good. Jefferson briefly summarized the Republican doctrine on this subject in a letter to Monroe:

Claims of  
the House  
in Treaty-  
Making.

x

“We conceive the Constitutional doctrine to be that the President and Senate have the general power of making treaties, yet when they include in a treaty matter confided by the Constitution to the three branches of the Legislature, an act of legislation will be necessary to confirm these articles, and that the House as one branch are perfectly free to pass the act or refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On this depends whether the powers of legislation shall be transferred from the President, Senate, and

House of Representatives to the President, Senate, and Piamingo, or any other Indian, Algerine, or other chief."

Y Jefferson acted on this principle in the Louisiana Treaty of 1803. He sought the judgment of the House before the treaty was made, and he approved the statement of Randolph that, in such a treaty, the Representatives "are as free as the President and Senate were to consider whether the national interest requires or forbids their giving the forms and force of law to the articles over which they have a power"; and there was, of course, no trouble about the law necessary to carry the Louisiana Treaty into effect. In 1868, in the contest between the two Houses over the Alaskan Treaty, while the House receded from the larger claim which it first put forth it still succeeded in securing the assent of the Senate, substantially, to the treaty-doctrine as announced by Jefferson. After the treaty with Russia by which we purchased Alaska, in 1867, the House hesitated to make the appropriation necessary to fulfil the obligation. General Banks, Chairman of the House Committee on Foreign Affairs, urged the appropriation on the ground, *inter alia*, of the obligation imposed by the treaty. Mr. C. C. Washburn, in a speech answering Banks, July 1, 1868, held that it was the "right and duty of the House to inquire into the treaty, and to vote or not vote the money, according to its best judgment." The House appropriated the money, but it prefaced its Appropriation Bill with the declaration that "the subjects embraced in the treaty are among those which by the Constitution are submitted to the power of Congress and over which Congress has jurisdiction; and for these reasons it is necessary that the consent of Congress should be given to the said stipulations, before the same can have full force and effect." The House made no mention of the Senate's ratifica-

Y  
Jefferson on  
the Powers  
of the House  
in Treaty-  
Making.

Y  
HOUSE ON  
The Alaskan  
Treaty, 1867.



tion, but merely referred to the fact that the President had entered into a treaty with the Emperor of Russia, agreeing to certain terms. This was equivalent to claiming that the consent of the House was as essential to a treaty as that of the Senate; and that a treaty was a subject for the consideration of Congress. The Senate denied this pretension and rejected this declaration unanimously. A conference committee evolved a compromise declaration that

“Whereas, the President has entered into a treaty with the Emperor of Russia, and the Senate thereafter gave its advice and consent to said treaty . . . and whereas said stipulations cannot be carried into full force and effect, except by legislation to which the consent of both Houses of Congress is necessary; therefore, be it enacted that there be appropriated the sum of \$7,200,000”

for the purchase of Alaska. This does not state that the House is free to refuse an appropriation, or to withhold legislation, necessary to carry out a treaty, but it must be assumed that the “consent of both Houses” means the free, not the forced, consent of those bodies.

It cannot be said that the law of the unwritten constitution of precedent and custom is fully established upon this point. The subject is still open to discussion and to differences of opinion. It is still held by high authority that while the House cannot be coerced to provide for the execution of a treaty, it is clearly the *duty* of the House so to do, and the necessary appropriation is discretionary with Congress only in the sense that the payment of public debts or the fulfilment of public obligations is discretionary,—that is, it cannot be compelled by any process of execution.<sup>1</sup> Yet what the House should do in such cases is a political rather than a judicial question;

<sup>1</sup> Cooley, *Constitutional Law*, p. 103.

and it is safe to say that political rather than judicial opinions and motives will govern.<sup>1</sup>

The tendency is clearly in favor of the doctrine announced by Jefferson, that while there is a strong presumption in favor of a treaty already made, yet the House has a right to defeat a treaty, by withholding necessary appropriations, if the proposed treaty is too objectionable or violates too much the House's appreciation of the public welfare.<sup>2</sup> "The House would not now in any case consider itself under a constitutional obligation to appropriate money in support of a treaty the provisions of which it did not approve. It is therefore practically true that all such treaties must pass under the judgment of the House as well as under that of the Senate and the President." Judge Cooley admits that, while the refusal of the House to carry out a treaty would be an extreme measure, yet "it is conceivable that a case might arise in which a resort to it might be justified."<sup>3</sup>

This view is further supported by the opinion delivered by Justice McLean of the Supreme Court:

"A treaty is the supreme law of the land only when the treaty-making power can carry it into effect. A treaty which

<sup>1</sup> The Supreme Court has recognized that legislation may be necessary before a treaty can become law, and that the House as a political branch of the Government may decide at its discretion whether it will complete a treaty. "When the terms of the stipulations import a contract, when either of the parties engage to perform a particular act, the treaty addresses itself to the political, not to the judicial department, and the Legislature must execute the contract before it can become the rule of the court."—See Chief Justice Marshall in *Foster vs. Neilson*, 2 Peters, 253. The Court in this case recognized a distinction between the provision of a treaty which is so framed as to operate directly upon the citizens of a country and a provision which merely stipulates that certain things shall be done. It is in the latter case only that legislation by Congress is necessary.—Boutwell, *The Constitution at the End of the First Century*, p. 291.

<sup>2</sup> See Blaine, *Twenty Years*, vol. ii., pp. 333-339.

<sup>3</sup> *Ibid.*, p. 338.

<sup>4</sup> *Constitutional Law*, p. 167.

X  
Power of the  
House to  
Prevent the  
Operation of  
a Treaty still  
Asserted.

stipulates for the payment of money undertakes to do that which the treaty-making power cannot do; therefore the treaty is not the supreme law of the land. To give it effect the action of Congress is necessary, and in this action the Representatives and Senators act on their own responsibility and judgment, not on the judgment and responsibility of the treaty-making power. No act of any part of the government can be held to be a law which has not all the sanction to make it law."<sup>1</sup>

However much the President may cultivate the Senate or individual Senators in seeking to provide smooth sailing for his treaties, he cannot always avoid opposition and antagonism in the open Senate. Misunderstandings arise, and Senators who have been supposed to give private assurances of support are afterwards found in open opposition. Grant accused Sumner of giving a private promise of support in the San Domingo Treaty, an accusation which arose, no doubt, from a misunderstanding. Occasionally Senators of the opposing party will seek to defeat a President's treaty in order to disparage or humiliate his administration; the desire to win a fraction of the foreign vote, the personal ambition of Senators to win prominence by an amendment, the supposed sectional interest of a group of States, all may conspire to carry Senators into opposition. Altogether the President's treaty has a hard gauntlet to run.

It is claimed by some that within the last generation the Executive initiative and independence in treaty-making has been seriously impaired,—much to the detriment of our national diplomacy. A President, the critics of the Senate assert, hardly ventures now upon a treaty of any importance unless he first obtains the assent of the Foreign Affairs Committee of the Senate, or of its Chairman; that foreigners look upon this chairman as a sort of second foreign secretary; having negotiated with one Secretary

Impairment  
of Executive  
Independence  
in Treaty-  
Making.

<sup>1</sup> Turner *vs.* The American Baptist Missionary Union.

of State they are not sure the treaty is made till our Senate Chairman has assented to it, and not then unless it is known that he speaks for the Senate; that the Secretary of State must now have the advice and consent of the Senate in his pocket before he starts in on a negotiation; that treaties habitually fall through in the Senate, or that body so amends them that the other party to the agreement withdraws from the negotiation. The Bayard-Chamberlain Treaty of 1888 on the Fisheries question, the Olney-Pauncefote General Arbitration Treaty of 1897, and the Hay-Pauncefote Treaty of 1901, were all defeated by senatorial amendment. The Senate insists on playing a part of the diplomatic game "from the shuffling of the cards to the taking of the last trick." It treats a document sent to it by the President as a treaty inchoate, as a rough draft, and then goes to work upon it, on the theory that its task is not one of mere approval or disapproval, but as if it were a part of the negotiating power. As a negotiator the Senate is inherently weak. It is not in a position to ask for information, or to suggest its proposals to the other party and, therefore, it cannot come to terms with him either by surrendering its point or by persuading him to yield, or by way of a compromise. Having refused to be content to be an advisory body, the Senate, through influential Senators, now insists that it should be consulted in advance, or during the progress of the negotiations. "This assertion of joint power with the Executive in negotiation is part and parcel of the general assumption of power by the Senate. It dictates appointments because it possesses the power of confirmation; why should it not dictate treaties, possessing also the power of ratification?" Must the Secretary of State now previously canvass the Senate to ascertain if a proposed treaty will receive the requisite number of votes?<sup>1</sup>

<sup>1</sup> I have attempted here to summarize a recent criticism by Mr. Henry Loomis Nelson under the caption, "A Mistake of the Fathers," *Harper's*

To this criticism it is replied on behalf of the Senate that no foreign power has a right to take umbrage because the Senate offers an amendment to a proposed treaty; that it is altogether proper for the Senate to look upon itself as one of the negotiators and to regard a treaty submitted to it, not as completed, but as only begun, as a mere project for a treaty. As either negotiator while a treaty is in the making may propose a new provision, which may be either accepted or rejected by the other negotiator, so the Senate may propose new provisions which the President will be expected to submit to the other party to the treaty. The Senate is co-ordinate with the President in treaty-making. The President begins a negotiation and continues it as far as he cares to before submitting it to the Senate. The Senate may then ask him to continue it farther by certain proposals. Precedents of a century, too numerous to cite, support this contention, and foreign powers should understand it. Before the adoption of the Constitution, the treaty-making was with the States. Under the old Confederation the assent of nine States was required to every treaty; a minority of the States could thus control the foreign relations of the country. The States did not entirely surrender the treaty-making power, but in conferring on the President an equal share in this sovereign power the States retained to themselves an equal share. In 1795, the Senate amended the Jay Treaty, ratifying on condition that a certain article be suspended. Since then no President has ever questioned the right of the Senate to amend.<sup>1</sup> Such is a summary defence of the Senate's prerogative in treaty-making.

**The Senate  
Asserts  
Co-ordinate  
Powers  
with the  
President  
in Treaty-  
Making.  
Senator  
Lodge.**

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*Weekly*, June 22, 1901. See also "The Paralysis of the Treaty-Making Power," *The Nation*, lxxi, 481.

<sup>1</sup>See "The Treaty-Making Power of the Senate," by Senator Henry Cabot Lodge, *Scribner's Magazine*, January, 1902.

While Senators may constitutionally and conscientiously oppose a President's foreign policy, it is clear that they ought not to do so from personal and party electioneering purposes, as they have been charged with doing. The President is much more disappointed in the failure of negotiations than the Senators, because from the functions of his office he is led to see the need of such negotiations, and, besides, individual Senators can evade responsibility and be personally indifferent to the result. It is difficult for public opinion to punish individual Senators for the defeat of a good treaty.<sup>1</sup> But whether the control of our foreign policy should be so divided is, nevertheless, a mooted question. Those who object to the co-ordinate participation of the Senate in treaty-making have frequently criticised the Senate, not because of its possession of this power, but because its use in particular cases has not been to their liking. They would give the Executive full power in negotiations, leaving to the Senate only the right and duty of assent (and of dissent only in extraordinary cases), because it is supposed that secrecy and despatch are essentials to successful diplomacy; and if the nation is bound to show its whole hand in a game with a foreign opponent (as a discussion in an executive session of the Senate may do), "precious opportunities of winning an ally or striking a bargain may be lost." This may be because diplomacy is looked upon as an international game of wits and expedients, where secrecy, indirection, and *finesse* are deemed essential to success and where open candor, fair dealing, and straightforward honesty can only lead to impotency and defeat. But this is not the American view of diplomacy, while in America gov-

<sup>1</sup> Mr. Kasson, on behalf of President McKinley's administration, devoted much labor and expert ability to the negotiation of important reciprocity treaties. The completed treaties were disregarded by the Senate, hardly receiving from the Senate the courtesy of respectful attention.

ernment by secretism is regarded as a very dangerous thing; and it is a very healthful restraint upon the President that he has to seek the pulse of the nation and to take into his counsels men who are in a sense the representatives of the people. It gives the nation a chance to "retire from a doubtful bargain." If a successful stroke in foreign policy require unity, quickness, and vigor, these may be found in the President's initiative. If his policy be manifestly for the national interest without room for dispute or cavil, the action of the President will not fail from lack of confirmation. If there be room for dispute, the Senate may be right and the President wrong; while in any case the division of final responsibility puts us on the safe side, and it does not prevent prompt action in the face of an unusual emergency.<sup>1</sup>

A treaty is the supreme law of the land, but it must be in harmony with the Constitution, otherwise, like any other so-called law, it is null and void. Treaties differ from laws only in form and in the organs by which they are made. It would seem to follow that a law may be repealed by a treaty as well as a treaty by a law. "If a treaty and a law are in opposition, their respective dates must decide whether the one or the other is to be regarded as repealed."

Jay argued in the *Federalist* that it was necessary to have the consent of both parties to a treaty before it could be annulled or cancelled; that while laws can be repealed by those who make them, a treaty is made by both of the contracting parties<sup>2</sup>; so the consent of both must be given

The Law of  
Treaties.

A Law of  
Congress may  
Abrogate  
a Treaty.

<sup>1</sup> In England the Cabinet has an almost unlimited discretion in foreign affairs, through the Foreign Secretary. Parliament has power to interfere, but it almost never does, because the governmental majority will not press the Foreign Office for information and force the exposure of the governmental policy when the Ministry declares it is undesirable that the information be furnished.

<sup>2</sup> Von Holst, *Constitutional Law*, p. 202.

<sup>3</sup> No. 64, *Federalist*, p. 405, Lodge ed.

before it can be cancelled. Gallatin said the same substantially when he asserted that it requires the same power to repeal a law that enacted it. But in experience it is found that Congress can nullify the action of the treaty-making power by the passage of laws that operate to defeat the provisions of treaties. Congress, in the Chinese Immigration Law, intentionally legislated in direct contravention of an existing treaty, and the Supreme Court sustained the act as binding (municipally), on the principle that the last Act of Congress repeals all previous laws in conflict with it, even though they may be treaties.

The last expression of the sovereign will must control. It was an Act of Congress of July 7, 1798, by which the stipulations of the famous French Alliance of 1778 were abrogated.<sup>1</sup> The courts of the United States cannot declare a law unconstitutional upon the ground that it violates treaty obligations. Such a question is an international one to be settled by the foreign nations interested and by the political departments of the Government.

The method by which a treaty is abrogated is properly a subject for international law. Though it may be set aside by a mere act of legislation, yet for such an act the nation may be morally condemned and such disregard of our treaty obligations may involve us in foreign complications. But if a treaty be violated by the other party, or if its execution be impossible, or if it require the violation of recognized moral law, or if its fulfilment become destructive to the state, the nation may be held justifiable in abrogating it without the consent of the other party.<sup>2</sup> This question first came up in American history in 1793, when Washington's adminis-

<sup>1</sup> See opinion of Justice Field in *The Chinese Exclusion Case* 130 U. S., 581; *Baldwin vs. Franks*, 120 U. S., 678.

<sup>2</sup> See Jefferson's opinion to Washington, 1793.

✓  
A Law of  
Congress  
Supersedes  
Treaty Law.

✗  
a subject  
Abrogation  
of Treaties.



tration had to decide whether it would hold the French treaties of 1778 to be binding upon us. The obligations of these treaties seemed inconsistent with the policy of neutrality which it was desired to pursue in the war then going on between France and England. Hamilton held that the Administration could re-nounce the treaties with France because the conditions had so changed since they were made as to render them disadvantageous and dangerous to us.

Hamilton  
and Jefferson  
on the  
Abrogation  
of Treaties,  
1793.

Y

"A treaty pernicious to the State is of itself void, where no change in the situation of either of the parties takes place. By a much stronger reason it must become voidable at the option of the other when the voluntary act of one of the allies has made so material a change in the condition of things as is always implied in a radical revolution of government."

This is a dangerous doctrine. A nation, in the exercise of an easy virtue, need not be without the excuse of changed conditions if it desired to escape the obligation of a treaty that had become inconvenient. "Compacts between nation and nation are obligatory on them by the same moral law which obliges individuals to observe their compacts"<sup>1</sup>; and a nation, like an individual, though it has sworn to its loss, should not break its plighted word. A righteous nation will not do so. A treaty should provide a method of renunciation. If this method be pursued, or, none being provided, if a mutual agreement to abrogate the treaty be honorably sought by one party and selfishly refused by the other; if the treaty have become seriously injurious to the national interest, and if the conditions under which it was made have become obsolete by the lapse of a generation or more of time, then the nation may be justified in declaring it abrogated.<sup>2</sup>

<sup>1</sup> Hamilton to Washington, 1793.

<sup>2</sup> Jefferson to Washington, 1793.

<sup>3</sup> See Bouvier's *Law Dictionary*.

"In the observance of treaties during the last one hundred and twenty-five years, there is not a nation in Europe which has been so exact as the United States, nor one which has a record so free from examples of the abrogation of treaties at the pleasure of one of the signers alone."<sup>1</sup>

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on the application of the legislature, or of the Executive (when the legislature cannot be convened), against domestic violence."

X  
The  
President  
and the  
Guarantee  
Clause.

This is called the "guarantee clause" of the Constitution. It guarantees to each State (a) a republican form of government, (b) freedom from domestic violence, (c) a settlement between rival State governments. For these three purposes the United States may interfere within a State.

(a) Considerable discussion has arisen as to which branch of the Government should carry out the guarantee of a republican form of government. The Supreme Court has held that

"under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of a State are admitted into the Councils of the Union, the authority of the Government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority. This decision is binding on every other department of the Government, and could not be questioned in a judicial tribunal."<sup>2</sup>

<sup>1</sup> Senator H. C. Lodge, *Scribner's Magazine*, January, 1902, on "The Treaty-Making Power of the Senate."

<sup>2</sup> *Luther vs. Borden*, 7 Howard, 1, decided in 1848. This case grew out of the Dorr Rebellion in Rhode Island in 1842. The people of Rhode

(b) Applications for protection against domestic violence and rival State governments are made to the President, though it rested with Congress under the Constitution to determine the means of fulfilling this guarantee. Congress might have placed it in the power of the Court to decide when the contingency had happened which required Federal interference; but Congress decided otherwise and imposed upon the President, by the Act of February 28, 1795, the lawful duty of fulfilling this guarantee, upon the call of the legislature of the

**Application  
for Protection  
Against  
Domestic  
Violence is  
Made to the  
President.  
Act of 1795.**

Island continued to live under the charter of 1663 until 1842, with only a few changes touching the right of suffrage. This charter limited the right of suffrage unjustly, and provided for unfair and unequal representation, and it did not provide for its own amendment. Many citizens became dissatisfied because the legislature would not afford relief. A proclamation was issued by petitioners, calling for a vote of the freeholders on a new constitution. A vote was held, and it was claimed that a majority had voted for a new government. The new government, through Dorr, its governor-elect, proceeded under its new constitution to assert its authority by force of arms. The old government resisted this, called out the State militia to subdue the rebellion, and passed an act declaring martial law. Dorr, the newly elected governor, marched upon the State arsenal with an armed force; but he failed to capture the arsenal and a few days later disbanded his forces and left the State. He was subsequently arrested, convicted of treason, and sentenced to life imprisonment, but was subsequently pardoned. Luther was a follower of Dorr. Borden, acting under the orders of the old government, broke into Luther's premises for the purpose of arresting him. Luther sued for trespass, claiming that such an act was wrongful and illegal. The question at issue then was, which government was the legal and the constitutional one. The verdict was given for Borden, both in the State courts and also in the Federal courts on appeal; this recognized the old charter government as legal. This was done because it was held Congress had recognized the old government in admitting its Senators and Representatives, and because the President had officially recognized the old governor. During the period of Reconstruction, Congress claimed to act with the President in guaranteeing a republican form of government to the Southern States. Thaddeus Stevens and other leaders of the congressional party held that the "United States" in this clause meant the Congress and the President as the entire lawmaking body,—the President to carry out the decision of the combined legislature.

**The Dorr Re-  
bellion.  
Luther vs.  
Borden.**

State, or of the Executive if the legislature cannot be convened. In the Rhode Island case of 1842, upon the application of the governor under the charter government, the President recognized him as the Executive power of the State, and took measures to call out the militia to support his authority, if it should be found necessary for the General Government to interfere; and it is admitted that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed (Dorr) constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. No court of the United States would have been justified in recognizing the opposing party as the lawful government, or in treating as wrongdoers, or insurgents, the officers of the government which the President had recognized.<sup>1</sup>

The court, therefore, considers Federal interference as a political subject and holds that the Constitution and the laws (Act of February 28, 1795) give to the President the power to determine whether or not a State is in a condition of insurrection, and it is his duty to recognize which is the true government. He should not be hampered or delayed in cases of this kind, and if, in his opinion, the guarantee clause (either of republican government or freedom from domestic violence) is violated, it is for him to declare martial law and order out Federal troops, if necessary. The Federal courts cannot review his action, nor interfere with his political conduct.

It is said that this power is dangerous to liberty and may be abused. All power may be abused if placed in unworthy hands. But where would this power be safer?

<sup>1</sup> *Luther vs. Borden*, 7 Howard, 1; *Boyd's Cases*, pp. 649-650.

Federal  
Interference  
is a Matter  
for Political  
Determination.

The power, to be effectual, must be prompt. At all events, this power is conferred by the Constitution on the President, and it is for him and no other to determine as to the conditions in a State, and what is the true character of the government therein. If the President should fall into error and invade the rights of the people of the State, it would be in the power of Congress to apply the proper remedy. The courts must apply the law as they find it.<sup>1</sup>

The President may not interfere against domestic violence except on the application of the legislature of the State or of the Executive of the State if the legislature cannot be convened.<sup>2</sup> But in case a domestic insurrection within a State violates United States law and obstructs the instruments or interrupts the operations of the functions of the United States Government, the President may intervene without awaiting the application of the State government or legislature. A notable instance of this is seen in President Cleveland's action in the great strikes in Chicago in 1894, in which he interfered to enforce the United States postal laws and the Interstate Commerce Act. This is the President's duty under another clause of the Constitution,—that which requires him to "take care that the laws be faithfully executed." But it is clearly the intention of the Constitution, and in accordance with the early precedents of the Government, that it is the function of the States to preserve domestic order, and that the United States Government is not to interfere (for other purposes than to protect its own rights and interests) except on the application of the State authorities. Of the necessity for aid the State authorities are to be the judge.<sup>3</sup>

Must the  
President  
Await the  
Application  
of the State  
Authorities?

<sup>1</sup> Luther *vs.* Borden.

<sup>2</sup> Constitution and Act of February 28, 1795.

<sup>3</sup> See Luther *vs.* Borden, 7 Howard, 42; Bryce, vol. i., p. 55; *International Review* for January, 1875.

During the late civil strife in Kentucky between two rival governments, Mr. Taylor, the Republican governor, appealed for Federal aid against an opposing Democratic legislature. The aid was refused by President McKinley's administration. It was explained that the exact functions of the United States Army, when acting within a State, have been most carefully defined and set out in General Order 26, promulgated July 24, 1894. Under the terms of this order, the Government of the United States can, of its own volition, use the Federal troops within a State only when insurrection, violence, unlawful combinations, or conspiracies in any State so obstruct or hinder the execution of the laws thereof and of the United States as to deprive any person or class of people of such State of any of the rights, privileges, or immunities or protection named in the Constitution and secured by the laws for the protection of such rights, privileges, or immunities, and the constituted authorities of such State are unable to protect, or from any cause fail in or refuse protection of the people in such rights.<sup>1</sup>

The war power of the President comes to him by virtue of the fact that he is made the Commander-in-Chief of the Army and Navy of the United States and is charged with "the faithful execution of the laws." In a civil or foreign war, or in the midst of great civil commotion, this may lead to a vast and dangerous exercise of power. During our Civil War, President Lincoln in his military power was almost a dictator, exercising more personal power than any English-speaking ruler since Oliver Cromwell. Congress consented to what he did, and it was not made clear to what extent

**The War  
Power of the  
President.**

<sup>1</sup> Another case in which the United States troops might be employed is set out in Sec. 5297, Revised Statutes, authorizing the President to employ troops in case of an insurrection in any State against the government thereof "on application of the legislature of said State or of the Executive thereof when the legislature cannot be convened."

the President could be restrained by law. When military law succeeds the civil law, the President, as the military chieftain, becomes absolute. This applies only to the territory over which the operations of war apply. Without waiting for a meeting of Congress, called for July 4, 1861, the President proclaimed a blockade of the Southern ports, called for seventy-five thousand volunteers, enlisted forty-two thousand three-year men into the service, and increased the regular army by twenty-two thousand men; later in the war he appointed and removed generals and commanders, directed and controlled the movements of fleets and armies, executed or pardoned criminals, suppressed newspapers, arrested and imprisoned their editors and other agitators without trial, suspended the writ of *habeas corpus*, and, finally, exercised the vast power of declaring free by proclamation all the slaves of the insurrectionary States. These acts were generally approved by Congress, and certain of them were sustained by the Supreme Court in cases testing the validity of the prizes made for violation of the President's blockade. All these powers, of course, are military powers and are not to be thought of in connection with the President as a civil officer.

Extent of  
Executive  
Power  
in War.

X

The suspension of the writ of *habeas corpus* is a most important power. It is an exercise of the power of martial law. The privilege of the *habeas corpus* is one of the great muniments of civil liberty. If the citizen has not this right his most precious civil interests are endangered; he may be in danger at any time of arbitrary arrest and imprisonment. If a citizen is arrested and kept in custody charged with a crime, he applies through his attorney for the writ of *habeas corpus*. The civil judge issues the writ, commanding the sheriff, or marshal, or executive officer, to have the body or person of the prisoner in court in order that

Suspension  
of the Writ  
of Habeas  
Corpus.

X

examination may be had to determine whether the prisoner is lawfully held. It will be the duty of the Court

Operation  
of the Writ  
of Habeas  
Corpus.

to order the prisoner to be released, or to be held for trial, according to the evidence. Under the right of *habeas corpus* the accused is entitled to this preliminary trial immediately or as soon as practicable after arrest. Formerly, in despotic times, princes often caused the arrest of suspected persons, or persons whom they wished to punish, and kept them in prison months and years without allowing the accused a trial in open court. The privilege of this writ has been one of the great objects of conflict in all the constitutional struggles of the past. To deny this right is to suspend civil liberty, to do away for a time with all civil rights. The Constitution recognizes that it may be necessary to do this; for in civil war, or insurrection, the ordinary civil processes are not sufficient to preserve order and to overcome resistance. The courts would become blocked, and more drastic summary processes must be made use of to restore order. It is to this end the President is entrusted with the military power. In the hands of an ambitious and unscrupulous man such power is very dangerous and may lead to usurpation and military autocracy, one of the most despicable forms of tyranny. It is only the stern necessity of self-preservation that can justify the vesting in one man of this supreme power, and it should be understood and emphasized that in doing so—in abandoning the *habeas corpus* and a civil trial—the nation, as Blackstone expresses it, is merely consenting “to part with its liberty for awhile in order to preserve it forever.” Only such a great end can justify such means. Therefore the Constitution provides that only when imminent danger threatens the public safety is the Government justified in the suspension of constitutional and civil government and the substitution of martial law.

The Constitution says: “The privilege of the writ of



*habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." <sup>1</sup>

Controversy has arisen as to whose function it is to suspend the writ of *habeas corpus*. Does it belong to the President or to Congress to decide when the public safety requires it?

Is it an Executive Function to Determine when to Suspend the Writ of Habeas Corpus?

In 1861, a direct conflict arose on this subject between the executive and the judicial power.

In May, 1861, John Merryman, of Baltimore, was arrested, charged with aiding armed hostility against the Government, of communicating with rebels, and of various acts of treason. He applied by petition to Chief Justice Taney for a writ

The Merryman Case.

of *habeas corpus* and a hearing. The Chief Justice issued the writ, but General Cadwalader declined to respond, alleging that he was authorized by the President of the United States to suspend the writ of *habeas corpus* for the public safety. An attachment could not be executed against the commander by a *posse comitatus* against a superior military force, and the Chief Justice was powerless to release the prisoner by civil process. In this case President Lincoln claimed the right not only to suspend the writ himself at his discretion, but to delegate that discretionary power to a military officer, and to leave it to him to determine whether he will or will not obey a judicial writ that may be served upon him. Chief Justice Taney affirmed, that under the Constitution and the laws, neither the Presi-

Taney's Opinion.

dent can suspend the privilege of the writ of *habeas corpus*, nor can he authorize any military officer to do so. The Chief Justice asserted that previously it was a point of constitutional law upon which there was no difference of opinion, and that it was admitted on all hands that the privilege of the writ could not be suspended except by

<sup>1</sup> Art. I, Sec. 9, Cl. 2.

Act of Congress. In English law and history it had always been a legislative act and not an executive act. This was also the opinion of Chief Justice Marshall as to the law in America.<sup>1</sup>

“When the conspiracy of which Aaron Burr was the head became so formidable, and was so extensively ramified as to justify, in Mr. Jefferson’s opinion, the suspension of the writ, he claimed, on his part, no power to suspend it, but communicated his opinion to Congress, with all the proofs in his possession, in order that Congress might exercise its discretion upon the subject, and determine whether the public safety required it. And in the debate which took place upon the subject no one suggested that Mr. Jefferson might exercise the power himself, if, in his opinion, the public safety demanded it.”<sup>2</sup>

After giving an argument in support of his view, the Chief Justice declared that a military government had been substituted for the government of the Constitution, ordered his opinion filed, and a copy sent to the President, with a call upon him “to perform his constitutional duty to enforce the laws; in other words, to enforce the process of this court.”<sup>3</sup> The dictum of Chief Justice Marshall was thus reasserted as a positive ruling, and this ruling has been concurred in by a series of decisions in the United States and State courts, and by other recognized authorities.

President Lincoln’s Attorney-General advised him that

<sup>1</sup> Bollman case.

<sup>2</sup> Opinion of Chief Justice Taney in *ex parte Merryman*, McPherson’s *History of the Rebellion*, p. 155. See *ex parte Bollman* and *Swartwout*, 4 Cranch, 100, per Marshall, C. J.; Thayer’s *Cases in Constitutional Law*, vol. ii., pp. 2374-2375.

<sup>3</sup> Taney quotes Story and Marshall in support of his view. For reply, see the argument of Hon. Reverdy Johnson in Moore’s *Rebellion Records*, vol. ii., p. 185, and the argument of Attorney-General Bates in McPherson’s *History of the Rebellion*, p. 158.

it was for the President alone to pronounce upon the political considerations which determine in what cases a suspension of the writ of *habeas corpus* might take place, and that the authority conferred upon him by the Constitution was in no wise affected by the powers with which the act of 1789 had invested the judges with regard to the writ of *habeas corpus*. A note of Secretary Seward to Lord Lyons, in October, 1861, contains a good summary statement of the claims of executive power in this respect.

Attorney-  
General  
Bates's View  
on Suspension  
of Habeas  
Corpus.

"It seems necessary to state that Congress is by the Constitution invested with no executive power or responsibility whatever, but, on the contrary, the President of the United States is, by the Constitution and laws, invested with the whole executive power of the Government, and charged with the supreme direction of all ministerial agents, as well as of the whole land and naval forces of the United States, and that, invested with these ample powers, he is charged by the Constitution and laws with the absolute duty of suppressing insurrection, as well as of preventing and repelling invasion, and that for these purposes he constitutionally exercises the right of suspending the writ of *habeas corpus* whenever and wheresoever and in whatsoever extent the public safety, endangered by treason or invasion in arms, in his judgment requires."<sup>1</sup>

Secretary  
Seward.

"If it be said that these acts of the President in time of war are unconstitutional, the answer is, that as commander-in-chief of the army and navy, the President has the constitutional power to employ the means recognized by the laws of war as necessary to conquer the enemy. Congress can pass no law which can deprive the President of the power conferred in creating him commander-in-chief."<sup>2</sup>

<sup>1</sup> Cited in Stevens's *Sources of the Constitution of the United States*, pp. 162, 163. See also *North American Review*, November, 1880.

<sup>2</sup> Landon, *Constitutional History and Government of the United States*, p. 205.

In his conduct of a war the President must have all the powers recognized by the laws and usages of war.

President Hayes is represented as speaking of the war powers of the President as follows:

“The President may at any time force Congress into war. The complicate relations with foreign powers renders this always easy. No man has yet defined the war powers or placed a limit on them. The executive power is large because not defined by the Constitution. The real test has never come, because the Presidents have, down to the present time, been conservative men, and have kept within limited range. The law of usage regulates the administration. But if a Napoleon ever became President he could make the Executive almost what he wished to make it. The war power of President Lincoln went to lengths which could scarcely be surpassed in despotic principle. This power has been described by Mr. Bryce as the power of a dictator.”<sup>1</sup>

The appointing power is one of the chief functions of the President, and it probably gives him more real political influence than any other function conferred upon him. He is charged “to see that the laws be faithfully executed”; and, consequently, he must be allowed to select and control the persons by whom the laws are to be executed. It will be seen from the language of the Constitution<sup>2</sup> that Congress can greatly reduce the power of the President over appointments. Congress may by law specify certain

**President  
Hayes on  
the War  
Powers.**

**The  
Appointing  
Power.**

<sup>1</sup> Stevens's *Sources of the Constitution of the United States*, p. 169.

<sup>2</sup> “With the advice and consent of the Senate, he shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for and which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, and in the courts of law, or in the heads of departments.”—Constitution, Art. II., Sec. 2, Cl. 2.

qualifications for appointees, determine the time and condition of their tenure, and provisions for their promotion. It was of course not supposed at the origin of the Constitution that the President would ever make appointments or removals from political motives, or that the Senators would take from him the initiative and control in appointments.<sup>1</sup> From the wonderful growth of the country and the resulting great army of appointive offices, it will be obvious what a tremendous political power the President might exercise if he chose to use his executive power to erect into a great machine, into an organized and disciplined corps, all his subordinates for the promotion of his ends. With one hundred and fifty thousand subordinates, commanding a hundred millions in salaries, it would be difficult to estimate the tremendous power the President could wield if he chose to use the powers of his office corruptly.

In 1789, during the first session of Congress a debate occurred in that body involving the power of the President to remove an officer appointed by him with the advice of the Senate. The Senate's consent being necessary to appoint, should it also be necessary to removal? This debate arose on a bill providing for the organization of the State Department. The bill originally contained a provision conferring the power of removal upon the President, but this was finally struck out as being superfluous, and a clause was substituted which took it for granted, or as clearly implied, that this power belonged to the President.

In the debate on this subject it was recognized by all<sup>2</sup> that, while the Constitution did not declare by whom the

<sup>1</sup> For the abuses in these directions see the subjects, "Senatorial Courtesy," pp. 225 *et seq.*, and the "Spoils System," in the author's *Political Parties and Party Problems*.

<sup>2</sup> Except Mr. Smith of South Carolina, who held that all administrative offices should be held by the tenure of good behavior and that removals be effected only by impeachment.

power of removal should be exercised, there must exist somewhere a prompt and summary power of removing an incompetent, unfit, or corrupt officer for offences short of violations of the law. Two principal views were held:

1. The President and the Senate should be combined in removals, as in appointments. Otherwise, it was thought, the influence of the Senate would be entirely nugatory in restraining the President. Congress cannot confer on the President what the Constitution has not conferred, and it would be better to leave the courts to determine where the power rests.

2. The other view asserted that the power of removal should rest with the President alone.

In his defence of the Constitution, Hamilton had held that the consent of the Senate would be necessary to displace as well as to appoint. It was upon this check he relied to prevent a sweeping revolution in the offices upon a change of administration,—if an unscrupulous President were to be the sole dispenser of the offices and should attempt a change for the sake of bringing in personal or party favorites.<sup>1</sup> Madison, Hamilton's collaborator in the *Federalist*, took a different view.

As to the danger that a President might abuse the power of removal by using it for personal and party purposes, Madison asserted that the wanton removal of meritorious officers would subject the President to impeachment and removal from his own high trust.

“Believing that no President would so abuse the powers of his office, and that he would be impeached if he did, Madison insisted that the power of removal should rest solely with the President. He and others in Congress urged that legislative action should remove all doubt on this subject; that what was omitted in the Constitution should be supplied by legislation;

<sup>1</sup> See *Federalist*, No. 77, and note in Ford's *Federalist*, pp. 511, 512.

that the removal of executive officers was an act so executive in its character and so intimately related to the execution of the laws, that it was clearly among the President's constitutional prerogatives, that participation of the Senate in removals would break down the separation of the powers deemed so essential in the Constitution. If a removal be desired by the President and denied by the Senate, the President would still be charged with the faithful execution of the laws while deprived of the loyalty and constancy of his subordinates and assistants. These would resent his efforts to remove them and would seek to thwart him in his work and they would rely upon another branch of the Government for their retention, and this would lead to defiant insubordination."<sup>1</sup>

Congress adopted Madison's view—by the casting vote of the Vice-President—and recognized the power of removal as resting with the President alone. *Rives's*  
 This interpretation of the Constitution went *The Contest under Jackson.*  
 unquestioned for a period of forty years, until Jackson's abuse of this power by his sweeping removals. His wholesale treatment of public places as party spoils led many to question the wisdom of the decision of 1789. The alarming growth of executive patronage<sup>2</sup> and the use to which it was now put led both Mr. Webster and Mr. Calhoun, two of America's greatest constitutional lawyers, to array themselves against Madison's view of the sole executive power of removal. The abuse of a power, however, is no evidence of its unconstitutionality. The spoils system and the danger *The "Four Years' Law," 1820.*  
 from executive patronage had been directly promoted by the notable law of 1820, known as the "four years' law." This law provides a limited term

<sup>1</sup> See ex-President Cleveland on "Executive Independence," *Atlantic Monthly*, June and July, 1901; Rives's *Madison*, vol. iii., p. 35; *Annals of Congress*, vol. i., p. 503.

<sup>2</sup> See Calhoun's famous report on this subject, Jan. 9, 1835, and his Speeches of Feb., 1835, *Works*, vol. ii., pp. 426, 446.

of four years for the offices mentioned. It was gotten up by Mr. Crawford, Secretary of the Treasury, for the purpose, as John Quincy Adams states, of securing "for Mr. Crawford the influence of all the incumbents in office upon peril of displacement, and of five or ten times as many ravenous office-seekers eager to supplant them."<sup>1</sup> The law itself vacates the offices, and this enables a President to displace satisfactory officers without the responsibility or odium of dismissing them, and to reward his party and personal favorites without exercising the power of removal. Madison's view and the Congressional decision of 1789, which gave the sole power of removal to the President, required positive executive action to cause a vacancy. The law of 1820 vacated the entire civil service of the country during the term of every President, who,

"without an order of removal, could fill every place, small or large, from Maine to California, from the mouth of the Columbia to the Keys of Florida, at his pleasure. In contemplating the possible results of so vast a power Mr. Calhoun said, in 1835, that, if it should ever deal with a corps of one hundred thousand office-holders, the friends of liberty might surrender in despair, for the people could not resist them for six months."<sup>2</sup>

**Vast  
Political  
Power of  
Removal.**

The use of the offices to promote party ends and to advance legislation that the President favors is one of the most palpable and dangerous forms of bribery. It stimulates both congressional intrigue and executive ambition, and it tends to the corruption of our whole political life. The President who buys votes by appointments betrays the national honor and becomes a corrupter

<sup>1</sup> Speech of George William Curtis, *Proceedings of National Civil Service Reform League*, 1883, Orations of Curtis.

<sup>2</sup> Address of George William Curtis, *Proceedings of National Civil Service Reform League*, 1883.



of public morals.<sup>1</sup> Yet notwithstanding the grave dangers that were to be apprehended from this source, the great arguments of Webster and Calhoun against unlimited executive removal, combined with the powers of appointment, did not succeed in changing the constitutional interpretation in this regard. Congress did not interfere in removals until the notable conflict with President Johnson in 1867. In that year the Tenure of Office Act was passed, for the avowed purpose of preventing removals from office by President Johnson. The majority thus set aside the congressional construction given to the Constitution seventy-eight years before. This Act

Tenure of  
Office Act,  
1867. The  
Conflict with  
President  
Johnson over  
Removals.

x

<sup>1</sup> Responsible writers have charged this serious abuse of his office upon President Cleveland in connection with legislation in 1893. "There he stood, unmindful of God, man, or devil, putting aside past promises and future obligations with the sublime shamelessness of dire need—stolid, unmoral, buying votes with offices with no more emotion in his choice of purchasable swine than a hog-buyer in the pens. The public service was filled with incompetent men, recommended by purchasable national legislators, who traded their votes for this patronage."—William Allen White, in *McClure's Magazine*, January, 1902. This well illustrates the menacing power of the Presidency when the vast powers of the office are in the hands of a man who will consent to use his appointments corruptly in order to carry through a legislative policy. "In this instance Mr. Cleveland did not confine his interest in legislation to his message, which was his constitutional limitation. But the observer of events in Washington saw the Executive bring to bear upon the legislative branch of the Government an amount of personal pressure unequalled, perhaps, in the history of the Republic. Even now one can recall how the emissaries of the President thronged the halls of Congress; how strange and remarkable conversions were wrought through influences which emanated from the White House and which it was not politic to withstand. When the bill wiping the silver-purchasing law from the statute books went to the Senate, it did not command a majority of that body; but during the three months of acrimonious debate the power of the Executive was exerted to such an extent as to win the support of those Senators whose votes were needed to accomplish the Presidential purpose. No one who is at all familiar with the inner history of that memorable and dramatic struggle will dispute these statements."—"The Growing Powers of the President," H. L. West, *Forum*, March, 1901.

conferred upon the Senate the power of preventing the removal of officers without the consent of that body. It was provided that during a recess of the Senate an officer might be *suspended*, but this was to be done only in case it was shown by evidence satisfactory to the President that the incumbent was guilty of misconduct in office, or crime, or when for any reason he should become incapable or legally disqualified to perform his duties; and that within twenty days after the next session of the Senate the President should report to that body such suspension, with the evidence and reason for his action in the case. "If the Senate concur in such suspension and consent to the removal of such officer they should certify to the President who may then remove such officer and appoint another. But if the Senate refuse to concur in such suspension, such officer so suspended shall forthwith resume the functions of his office."<sup>1</sup> This Act was passed with the design of forcing an unwelcome Cabinet officer upon the President, and in other respects tying his hands in the administration of his office. The Act was probably intended to be personally degrading to President Johnson and could only have grown out of the abnormal excitement created by the dissensions between the two departments of the Government.<sup>2</sup> It presented the question whether the members of the President's Cabinet, his trusted associates and advisers, owe greater obedience to the Senate than to their Executive Chief in affairs relating to executive functions.

On the 5th of April, 1869, just a month after the inauguration of President Grant, Congress and the President then being in party harmony, the provisions of the Tenure of Office Act that interfered with the President's power in removal were repealed. They had served their purpose against President Johnson. This prerogative of the President is now virtu-

Tenure of  
Office  
Act Uncon-  
stitutional.

<sup>1</sup> Act of 1867.

<sup>2</sup> Blaine, vol. ii., p. 274.

ally restored, and it is now generally held by publicists of both parties that the Tenure of Office Act was unconstitutional and would have been so held by the courts if it could have been tested.<sup>1</sup> In 1886, what was left of the Tenure of Office Act was repealed, and, as President Cleveland says, there was

“thus repealed the last vestige of statutory sanction to an encroachment upon constitutional executive prerogatives. In the matter of appointment, the President is to be the independent agent of the people, representing a co-ordinate branch of their Government, charged under his oath with responsibilities which he ought not to avoid or share; and invested with powers not to be surrendered, but to be used under the guidance of patriotic intentions,—answerable to his conscience and to the people.”<sup>2</sup>

The Executive Departments have been created from time to time by Acts of Congress. The heads of these departments compose the Cabinet, though the “Cabinet” is not recognized in the Constitution. Only three departments were created in 1789, the Department of State, the Department of the Treasury, the Department of War. The office of Attorney-General was established in 1789, and that officer has always had a place in the President’s Cabinet, though the separate department over which he presides—the Department of Justice—was not erected until 1870. The Navy Department was added in 1798; and the Department of the Post-Office was made a Cabinet position

The  
Executive  
Departments.  
The Cabinet.

<sup>1</sup> See Blaine’s *Twenty Years of Congress*, vol. i., pp. 267–274. See, also, ex-President Cleveland’s articles on “Executive Independence,” *Atlantic Monthly*, June and July, 1900; President Johnson’s Message, vetoing the Tenure of Office Act, March 2, 1867; Richardson’s *Messages and Papers of the Presidents*, vol. vi., p. 492; the Commentaries of Kent and Story are quoted by President Johnson (the message was probably prepared by Secretary Seward), and the case is cited in which the question was considered by the Supreme Court, *ex parte Hennen*, 1839, 13 Peters, 139.

<sup>2</sup> *Atlantic Monthly*, July, 1900.

in 1829, though the office itself had existed from colonial times, Franklin having distinguished the office by his service in it. The Interior Department was added in 1849, and the Department of Agriculture in 1889. The Department of Commerce and Labor is now (1903) about to be added to the Cabinet offices, and it has been frequently proposed to bring the Bureau of Education into a Cabinet dignity.

X "The president may require the opinion *in writing* of the principal officer in each of the Executive departments upon any subject relating to the duties of their respective offices."

The Constitution and the Cabinet.

This is all that the Constitution says anywhere about any such body as a Cabinet. It is evident that the Constitutional Convention did not intend to constitute a council like the English Privy Council. All that was contemplated was that the President should consult the heads of the several departments separately about the duties of their respective offices, not that he should assemble them together for consultation and advice on the general policy of the administration. He might follow this advice or not, as he chose; and he could proceed with the most important presidential matters without asking it, as John Adams did in our French relations in 1800, and Jefferson in the Louisiana Treaty in 1803, and in the Monroe-Pinkney Treaty of 1806. Washington generally pursued the practice of consulting his Cabinet members individually. Before making up his mind what policy he should pursue, he asked the opinions of his Secretaries in writing. Some of our most valuable historical State papers came to us in this way,—in the written opinions of Jefferson and Hamilton prepared at Washington's request.<sup>1</sup> The Cabinet as we see it to-day is the product

<sup>1</sup> Note especially the opinions on our neutrality policy and the constitutionality of the First United States Bank.

of evolution. Whatever law regulates its proceedings and its relations to the President and to Congress is the law of the unwritten constitution. Under John Adams some of the Secretaries presumed to consider themselves as co-ordinate integral parts of the Executive Department, and as not answerable to the President. Pickering, Adams's Secretary of State, went so far as to act without regard to the harmony of the Administration as a whole, and he even attempted to thwart the publicly announced policy of his chief. Though Congress in creating the departments had ruled in favor of the President's power to remove a Cabinet officer without the consent of the Senate, Adams's removal of Pickering for thus attempting to create this impossible situation caused considerable political friction and opposition. Jefferson dominated his Cabinet, but he did it more by his personal influence than by his official power.

"When a question occurred of sufficient magnitude to require the opinions of all the heads of departments, he called them together, had the subject discussed, and a vote taken, in which he counted himself as but one. But he always seems to have considered that he had the power to decide against the opinion of his Cabinet. . . . When there were differences of opinion, he aimed to produce a unanimous result by discussion, and almost always succeeded. But he admits that this practice made the Executive, in fact, a directory."<sup>1</sup>

Some Presidents have been more influenced by their Cabinets than others. President Buchanan was much worried by his Cabinet because he was not strong enough to insist upon his own will. Lincoln decided upon his Emancipation Proclamation, and he submitted it to his Cabinet merely for suggestion.<sup>2</sup> In departmental matters

<sup>1</sup> G. T. Curtis, cited in Walker's *Making of the Nation*, p. 91.

<sup>2</sup> Stevens's *Sources of the Constitution*, p. 168, notes on a conversation with President Hayes.

the President gives a wide latitude to the Secretary, but occasionally he may overrule the Secretary.

The head of a department is not merely the active administrator of the daily business of his department.

**Duties of  
the Cabinet  
Secretary.** This will be attended to by the Assistant Secretaries and by the heads of bureaus and divisions.

The Secretary must know his department, its needs, and its forces, that it is doing well, and that his plans and those of his chief are being carried out. But the Secretary's chief function is to act as adviser of the President not only as to the matters of his department, but as to the general welfare and policy of the country. He should, therefore, be in harmony with the policy of the President. He should be of the President's party and of the President's wing of the party, and in friendly personal relations with the President. Washington attempted to bring into his Cabinet men of radically different political opinions. Jefferson and Hamilton did not naturally belong to the same official family. This effort of Washington to bring them into the same Administration and to govern without reference to party came from the fact that he deplored the party spirit as dangerous to the country's interests, and his conception of the Presidency was that, like the English Crown, it should be above party, fair to all, partial to none. But our party history was destined to make the Presidency an office for party leadership, and since the first distinctive party victory under Jefferson, in 1800, the President's Cabinet officers have been in party harmony with the President and with one another. It is now one of the well-established understandings of the Constitution that if a Cabinet member cannot agree with the President and loyally and harmoniously carry out the President's policy, he should resign or the President should have the right to remove him. The Cabinet is the President's official family, and in general public policy they are all expected to stand to-

gether. In 1841, Mr. Tyler's Cabinet resigned because they felt that the President was abandoning his party principles. They would no longer be identified with an administration to which they were really opposed, and they wished to rebuke the President.<sup>1</sup> In 1866, disaffection arose in President Johnson's Cabinet. Mr. Speed, the Attorney-General, Mr. Dennison, the Postmaster-General, and Mr. Harlan, the Secretary of the Interior, all resigned because they thought it improper to retain office under a President with whom they differed so widely on the question of Reconstruction. Mr. Stanton, the Secretary of War, though likewise opposing President Johnson, remained in the Cabinet. His purpose was to act as the minister of Congress, to defeat the President's policy, and protect the country against him. The majority in Congress sustained Stanton, and by the Tenure of Office Act prevented the President from removing him. They transferred many military functions of the President to the Secretary of War, and, in effect, deprived the President of his constitutional prerogatives. Not to speak of Stanton's indelicacy in seeking to remain with a President not wanting him, this would have been to change our system from the Presidential system, in which the minister is responsible to the President, to the Parliamentary system, in which the minister would be responsible to Congress.

"The President, not the Cabinet, is responsible for all the measures of the Administration, and whatever is done by one of the heads of department is considered as done by the President, through the proper executive agent. In this fact consists one important difference between the Executive (King) of Great Britain and of the United States; the acts of the former being considered as those of his advisers who alone are responsible therefor, while the acts of the advisers of the

<sup>1</sup> Mr. Webster retained his place in order to complete important negotiations,—the Webster-Ashburton Treaty,—though he was in party harmony with his colleagues and condemned Tyler's party course.

American Executive are considered as directed and controlled by him." <sup>1</sup>

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<sup>1</sup> Cooley's *Blackstone*, Commentaries, book i., p. 231, n. 6, cited by Stevens's *Sources*, p. 171. "On the President's Cabinet." See *Harper's Weekly*, Oct. 12, 1901.



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## CHAPTER IV

### THE SENATE

**T**HE present Senate of the United States, if all elections were complete, would consist of ninety members, two members from each of the forty-five States.<sup>1</sup> By the Constitution which created the Senate, the Senators are chosen by the legislatures of their respective States for a term of six years, and each Senator has one vote.

A Senator is required:

**Qualifications of Senators.** To be thirty years of age;  
To have been nine years a citizen of the United States; and

To be, at the time of his election, an inhabitant of that State for which he is chosen.

No Senator can hold any other office under the United States.

The Vice-President of the United States is the presiding officer of the Senate. He votes only in case of a tie.

**The President of the Senate: Right to Vote.** The Vice-President, unlike the Speaker of the House, is not a member of the body over which he presides. He can therefore claim no right to vote, except in case of a tie. The Senate may choose, with its other officers, a President *pro tempore*, who presides in the absence of the Vice-President, or

<sup>1</sup> The English House of Lords has about 592 members; the French Senate, 300; the German Bundesrath, 58. The latter body represents the German states.

when the latter shall exercise the office of President of the United States. The President *pro tempore*, as a member of the Senate, may claim a vote on any question at issue, but, having voted once, he cannot, of course, vote again even in case of a tie. <sup>The President *pro Tempore*.</sup> Al-ways in a tie vote the pending measure is lost.<sup>1</sup>

At the first organization of the Senate its members were divided, according to the Constitution, into three classes, —the seats of the Senators of the first class to be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, of the third class at the expiration of the sixth year. <sup>Classes of Senators.</sup> Senators from a new State are assigned by lot to two of these classes. One of the newly elected Senators may fall into a class whose term expires in two years, the other into a class whose term expires in four years, or in six. By this provision the two Senatorships from the same State can never be vacant at the same time. So when Senators are elected from a new State one of them may serve for only two years and the other for four. However, such Senators are usually re-elected by their States for a full term.

The Senate is called a continuous, or permanent body, because it has in every Congress two-thirds of the same members as in the Congress just preceding. <sup>The Senate a Permanent or Continuous Body.</sup> The body does not change all at once, as do assemblies created by a single popular

<sup>1</sup> In 1868, while the Senate was sitting as a court in the impeachment trial of President Johnson, Senator Wade, of Ohio, was President *pro tempore* of the Senate. His right to vote on the charges of impeachment was disputed, although the Chief Justice was presiding, on the ground that Wade was directly personally interested in the result of the vote, since if Johnson had been removed Wade would have become acting President. Wade based his right to vote on the constitutional provision that no State shall be deprived of its equal representation in the Senate except by its own consent, and if his right to vote were denied Ohio would have but one vote in the Senate. By the decision of the Senate, Wade was allowed to vote. He voted for the impeachment and removal of the President.

election, but undergoes an "unceasing process of gradual renewal." "Always changing, it is forever the same." This permanent character qualifies the Senate to help conduct the foreign policy of the nation and adds to the traditional dignity of the Senate.<sup>1</sup>

A vacancy from a State, occurring by death or resignation during a recess of the State legislature, is filled by temporary appointment by the State governor until the next meeting of the legislature, which shall then fill the vacancy. It has been recently determined, however, that the Senate, which is the judge of the election of its own members, will not recognize the appointment by a governor in case an intervening legislature fail to elect. The failure of a State to elect, when opportunity is offered to its legislature, is construed as equivalent to the State's consent that it be deprived of equal representation in the Senate. The governor may appoint only to vacancies "which happen during the recess of the legislature." "Happen" is here interpreted to refer only to vacancies created by accident, not to those created by law. It is the duty of a State to provide for election in advance of a legal vacancy. Vacancies may "happen" by death, resignation, expulsion, and by accepting an incompatible office. But the governor may not fill any vacancy which he finds existing when the legislature is in recess. In that case, a senatorial candidate who has the favor of the governor would need to have only enough supporters in the legislature to prevent an election. If the legislature be forced to adjourn without electing the Senator, the governor could take the selection into his own hands.<sup>2</sup>

Vacancies in  
the Senate.  
How Filled.

<sup>1</sup> Bryce, vol. i., p. 103.

<sup>2</sup> See Foster on the Constitution. Case of Lee Mantle of Montana, Aug. 23, 1893, *Congressional Globe*. Speech of Senator Burrows of Michigan, in the Quay case, April 14, 1900.

Such are the more or less familiar constitutional provisions touching the composition of the Senate.

The origin of the Senate is of historical interest and of political significance.

Origin of the Senate.

As is well known, the so-called Congress of the old Confederation consisted of but a single house. This body, as we have seen in our notice of the old Confederation, was more of a diplomatic body than a legislature. We have seen that, in the old Congress, questions were

determined by the voices of States, and the voice of any one State was equal in weight to the voice of any other. The members were State delegates,—they were elected by States, were paid by the States, and could be recalled by the States. The Congress was to consider cer-

The Congress of the Old Confederation: A Diplomatic rather than a Law-Making Body.

tain definite subjects, which the States, through their delegates, had assigned to it for consideration. The old Congress was lacking in the two prime requisites of a governing body: it could not enforce a law nor collect a tax. There is a political absurdity involved in the assertion which we sometimes hear, that the old Confederation could make laws but could not enforce them; for a so-called government which has no law-enforcing power has really no law-making power. What such a body makes may be a proclamation, or resolution, or recommendation, but not a law. It is evident that the men who framed the Confederation did not look upon its Congress as a law-making body, except to a very limited extent, and that strictly specified. If a law-making body as part of a real government had been intended by our fathers when their States formed a league in 1781, they would doubtless have formed their Congress after the pattern of every government, save two, of which they had any working experimental knowledge. That is, they would have given their legislature the bicameral, not the unicameral, form. The bicameral form of legislature is the

form of two houses. All of the original State legislatures, except Pennsylvania and Georgia, had the bicameral system, and all the later States, except Vermont in its early history, have followed this pattern. The advantage of two houses was thought to be that one should act as a check on the haste and error of the other. In several of the Colonies the upper houses were only small executive bodies, appointed to assist the governor, with power to check legislation by a suspensive veto. But after the Revolution these soon came to be co-ordinate houses of legislation. In America the need of two chambers came to be deemed "an axiom in political science, on the belief that the innate tendency of an assembly to become hasty, tyrannical, and corrupt needs to be checked by the coexistence of another house of equal authority."<sup>1</sup>

This theory was pretty deeply imbedded in the minds of the framers of our Constitution. So when they came together in the Constitutional Convention of 1787, to provide for a new Congress—for a really effective government—the first two propositions of importance coming before them were:

(1) That the right of voting in the new national legislature ought to be proportional either to wealth or to inhabitants; that it ought not to be, as it had been, one State, one vote;

(2) That this legislature should consist of two houses.

The proposition for a bicameral, or a two-house, legislature was agreed to on the second day of the Convention

<sup>1</sup> The Constitution of Pennsylvania of 1786, that of Georgia of 1777, and the two Constitutions of Vermont, 1786 and 1793, all provided for only one house in the Legislature. Each provided for an Executive Council with power of checking or delaying the acts of the law-making body. Georgia created two houses in 1789, Pennsylvania in 1790, and Vermont in 1839. On the division of the legislature, see Bryce, vol. i., p. 480; Kent's *Commentaries on the American Constitution*, vol. i., pp. 208-210; Story's *Commentaries*, pp. 548-590.

without discussion or dissent, except that of Pennsylvania, "given probably from complaisance to Dr. Franklin, who was understood to be partial to a single house of legislation."<sup>1</sup> The proposition for an upper house was never again brought into question in the Convention. A second chamber was a part of their ancestral inheritance from England, and a part of the colonial governmental form. Mason of Virginia said: "In two respects the mind of the people of America is well settled: First, in an attachment to republican government; secondly, in an attachment to more than one branch in the legislature." "The bicameral system," says Lieber, "accompanies the Anglican race like the common law."<sup>2</sup> The unicameral system was common in France, but not in England. At that

<sup>1</sup> Madison's *Journal of the Debates*, p. 78, Scott edition.

<sup>2</sup> Historically, the idea of two chambers in the legislature was of feudal origin; it grew out of certain social orders and the struggles between these orders. Through this idea the nobility, the Church, and the gentry each sought to preserve and advance its separate power and privileges in the State, and each of these estates had its chamber. In England these three merged into two, the higher clergy merging with the Lords, the country gentry with the Commons. But in the State legislatures of America the two chambers represent the same constituencies and protect the same interests. In our earlier history, in many of the Colonies, and later in some of the States, one branch of the Government was intended more especially to be the guardian of property, and property qualifications were required for membership in the Senate in several of the States. (See *Federalist*, No. 54, p. 364, Ford's edition, also Webster's speech on "The Basis of the Senate in Massachusetts," *Works*, vol. iii., p. 8.) But this use of an upper chamber soon disappeared. It seemed that the use of the double system had ceased to exist when the distinctions between the constituencies to be represented had been swept away. For these reasons, and under these changing conditions, publicists like Franklin and Turgot favored a single chamber. The only basis of representation in our State Senates different from that of the lower Houses is a larger territory and a larger group of population. For the United States Senate the States furnished a ready-made basis of representation. There is no essential difference between our national Senate and House in composition, character, or purpose. The Senate represents the people in States, and is, like the House, dependent on public opinion. See the *American Law Review*, October, 1869, vol. iv.

time one system might have been called French, the other English. Our Senate, then, came into existence because of the preference of the colonial statesmen for the English system, the only system which they had known in practice.

It is often supposed that the Senate had its origin in the necessity of providing for equal representation of the

States, in order that the differences between the large and the small States might be compromised and reconciled. "The division of Congress into two houses supplied a means of settling the dispute between the large and the small States."<sup>1</sup> This division may have supplied such a means, but it was not made for that purpose. The bicameral system was determined on without reference to the dispute over equal representation. Only the purely Confederate party, those who wished to retain the form of the old Confederation, favored the retention of only one House of Congress, and that because they did not wish to make Congress a *law-making* body, with power of legislation for individuals. The *form* of the Senate was modified by the necessity of conciliating the small States; but it is evident, as we have shown, from the history of the Convention, that we should have had the Senate in some form even if there had been no conflict between the large and the small States. It was found to be necessary to provide in the Senate for a representation of statehood, in order to enable large and small States to come together under a common Constitution; but this was done after the Senate itself had been fully determined upon, and it is important only as affecting the form of the Senate. The representation of statehood is neither the *originative* nor the *determinative* principle of the Senate. That is, it did not grow out of that principle, nor does the Senate determine questions upon that principle. It is not required

Equal Representation and the Origin of the Senate.

<sup>1</sup> Bryce, vol. i., p. 184.



in the Senate, as it was under the old Confederation, that a majority of the States shall vote for a measure before it can be carried. Each State has two Senators, but in making decisions the Senate does not vote by States. A Senator's vote is his own, not his State's, and the two Senators may be members of different political parties and vote on different sides of the same question. Under the purely federal plan of voting, the two Senators would cast a single vote, and unless they could agree the State would lose its vote and have no voice in the decision.'

But, after all, the struggle for equal representation of the States determined the *form* of the Senate, and in such an important particular that it is often said that the Senate itself is the result of the compromise which grew out of this struggle. A knowledge of this compromise and of the struggle which led to it is essential to an understanding of the way in which the Senate became what it is.

The most hotly contested question in the Constitutional Convention was whether the States should have equal or proportional representation in the new Congress to be created. The essential point with the national party, chiefly representing the large States, was that the States should vote in some equitable proportion. The Con-  
federate, or Small-State party, insisted on retaining the plan of the old Confederation,—one State, one vote. Read of Delaware said that if the rule of voting were changed it might become the duty of his State to retire. Paterson of New Jersey said:

The Contest  
between  
Equal and  
Proportional  
Represent-  
ation.

"I consider the proposition for proportional representation as striking at the existence of the lesser States. I deny power to the Convention, from its nature, powers, and structure, to

<sup>1</sup>Of course, if a majority of the States should be required to carry a measure, a State whose vote was equally divided would count in the negative.

make any change in the rule of suffrage; the idea of a national government as contradistinguished from a federal one, has not entered into the mind of the people. We must retain the federal [confederate] form, and a confederation supposes sovereignty in the members composing it, and sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made then there may be fairly an equality of representation. Virginia, Massachusetts, and Pennsylvania are the three large States; the other ten are small ones. I say that the small States will never agree to such disparity in suffrage as to allow Delaware one vote to Virginia's *sixteen*, which would be the proportion under the proposed plan. . . .

"Mr. Wilson (of Pennsylvania) has hinted that the large States would find it necessary to confederate among themselves if the others refused to concur. Let them unite, if they please, but let them remember that they have no authority to compel others to unite. New Jersey will never confederate on the plan before this Committee. She would be swallowed up. I would rather submit to a monarch, to a despot, than to such a fate. I shall not only oppose the plan here, but on my return home I shall do everything in my power to defeat it."

Mr. Wilson of Pennsylvania answered Mr. Paterson. He said:

"I hope that some of the States, at least, will unite for their safety. Proportional representation is fundamental. As all authority is derived from the people, equal numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives. Mr. Paterson has admitted that people, not property, are the true measure of suffrage. Are not the citizens of Pennsylvania equal to those of New Jersey? Should it require 150 of the former to equal 50 of the latter? Representatives should hold the same proportion to each other as their respective constituents do. If the small States will not federate on this

plan, Pennsylvania will not federate on any other. If New Jersey will not part with her sovereignty it is vain to talk of government." <sup>1</sup>

These extracts show the temper of the debate and its significance. Dr. Franklin had to remind the members that they were there to consult, not to *contend*, with each other; and that declarations of fixed opinion, and of determined resolution never to change it, neither enlighten nor convince men. Light, not heat, was what was wanted, where harmony and union were extremely necessary to a common agreement.

After this heated debate the Convention agreed by a vote of seven States against three <sup>2</sup> that the rule of suffrage in the first branch of the national legislature should not be according to the old rule, but "according to some equitable ratio." The three-fifths basis was soon agreed to as an "equitable ratio," using the proposed amendment to the Articles of Confederation, submitted with the revenue measure of April, 1783, as a precedent.<sup>3</sup> Then it was voted that the rule of voting in the Senate should be the same as in the House. This seemed to conservative members to be pushing things too far; it appeared

<sup>1</sup> Madison's *Journal*.

<sup>2</sup> The vote of Maryland was divided. New Hampshire and Rhode Island were not represented in the Convention.

<sup>3</sup> By the Articles of Confederation the States were to contribute toward the expenses of the General Government in proportion to the value of their lands and improvements, assessed by the several States. This was never satisfactory, and was agreed to in Congress, in 1777, because there were no data at hand for determining a better plan. In April, 1783, it was proposed by Congress that the States permit Congress to collect a small uniform revenue, under restrictions and regulations to be agreed to by the States. With this revenue proposition an amendment to the Articles was proposed which provided that payments should be made to the common treasury by the States "in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a number of years and three fifths of all other persons, except Indians not taxed." This language is identical with

that the decision might result in the dissolution of the Convention. The members from the small States, opposing a national government, "because they considered proportional representation the basis of it,"<sup>1</sup> got together outside the Convention and concerted the "Paterson plan," which proposed to retain essentially the plan of the old Confederation. Dickinson said to Madison:

"You see the consequences of pushing things too far. Some of the members from the small States wish for two branches in the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power than to be deprived in both branches of the legislature of an equality of suffrage, and thereby be thrown under the domination of the larger States."<sup>2</sup>

Following the introduction of the Paterson plan there was a long and impassioned debate. Mr. Ellsworth of Connecticut moved that the rule of suffrage in the second branch (Senate) be the same as that established by the Articles of Confederation.

"We have decided," he said, "against this rule in the first branch. For that I am not sorry. I hope it will become a basis of compromise. We are partly federal, partly national. Proportional representation is conformable to the national principle and would secure the large States against the small. An equality of voices is conformable to the federal principle and will secure the small States against the large. Let us find a middle ground of compromise. Massachusetts is the only Eastern State which will agree to the plan without equal

that of the famous *three-fifths* compromise of the Constitution. All the States in Congress had agreed to this as a fair basis of apportioning taxes among them, and when, in 1787, the dispute was one over the basis of voting, since taxation and representation were supposed to go together this former agreement was taken as the basis of settlement. Such is the origin of the three-fifths compromise.

<sup>1</sup> Madison's *Journal*.

<sup>2</sup> *Ibid.*, June 15th.

voices. An attempt to deprive the States of this dearest right will cut America in two. I can never admit that there is no danger of a combination of the large States. . . . We are running from one extreme to another. We are razing the foundations of the building when we need only repair the roof."

Much more of the discussion follows, but enough of it has been given to show that in the Convention there were two clearly defined parties, or bodies, of opinion :

1. One looked upon the States as geographical districts of people composing one political society.
2. The other considered the States as so many distinct political societies.

But, as Dr. Johnson of Connecticut pointed out,

"the fact was that the States did exist as political societies, and a government was to be formed for them in their political capacity, as well as for the individuals composing them. The States must be considered in their political capacity in some respects and as districts of people in others. The two ideas embraced on different sides instead of being opposed to each other ought to be combined; that in one branch the people ought to be represented, in the other, the States."

Here Johnson expresses exactly what was done in the formation of our Congress.

Thus, the so-called Connecticut Compromise, particularly urged by Oliver Ellsworth, Roger Sherman, and Dr. Johnson from that State, resulted in the composition of the Senate as we know it to-day, by which each State has an equal number of votes in the Senate, in consideration of proportional representation being allowed in the House.<sup>1</sup>

It will be seen that the supposition of the framers was

<sup>1</sup> That money bills might originate in the House was also a part of this arrangement.

that there would be constant conflict of interests between the large and the small States. It has never been so in practice. Ten large States could control the House, but in the Senate they have but twenty votes out of ninety. The House has never been the organ of the large States nor the Senate of the small States. American politics have never turned on conflicts between these two sets of States.<sup>1</sup> Madison perceived and pointed out that the conflict would occur between the Northern States and the Southern, owing to differing interests,—especially on account of slavery.<sup>2</sup> But it was especially desired to make the Senate *federal* in character, to make it a body representing the States as separate and equal political communities.

It is seen from studying the origin of the Senate that its federal nature was considered its dominant characteristic.

It helped to preserve the federal scheme, that  
 The Senate is Federal in Character, not Democratic.

is, a government by States. Here the States were still to be equal. Such an arrangement, it is clear, is not at all democratic, not conformable to republican government. Nevada, with a population of forty-two thousand, less than one fourth as many people as are in the city of Indianapolis, has as much power in passing the laws of the land, or preventing their passage in the Senate, as New York with over seven million inhabitants. Delaware, hardly larger than two good-sized counties, has as much weight in the Senate as the great State of Illinois. Of course, a state of things in which forty thousand people are given as much political weight as seven million people is not conformable to democratic government. It is, as Mr. Bryce says, as if a single county in England should be given as much weight in the British Parliament as all of Scotland and the most

<sup>1</sup> Bryce, vol. i., p. 185.

<sup>2</sup> See also Hamilton in the New York Convention, Elliott's *Debates*, p. 213.

of Wales. But we must remember, in thinking of this situation, that our fathers did not wish to form a purely democratic, consolidated government. They formed a Federal Government. They did not form a government for the people of the United State *en masse*; they formed a government of the people in States.

With the growth of the spirit of democracy, with the increased feeling that the majority voice of the whole people of America should be decisive in the making of the laws, a demand has arisen that this provision of the Constitution be changed; that the Senate be more democratic, more representative of the population, as was first contended by the Large-State party in the Convention of 1787. It has been suggested, for instance, that every State be allowed an additional Senator for every million of its population, each State with less than a million still being allowed two.

Can Equal  
Representa-  
tion in the  
Senate be  
Abandoned?

This would, of course, require an amendment to the Constitution which would be very difficult, if not impossible, to obtain. It would violate the original agreement between the States when the Constitution was formed. For when the clause providing for amendments was inserted in the Constitution it was specifically agreed that no State, by amendment, "shall be deprived of its equal suffrage in the Senate without its consent."<sup>1</sup> This, of course, is to be looked upon merely as a vain attempt to limit the future sovereignty of the nation. The sovereignty of the nation cannot be limited, and if, in future, the people of the States wish to make a new Constitution, omitting this provision, or to amend the present Constitution by dropping it, they are competent to do so.<sup>2</sup> But this provision

The Sovereign  
Power is  
Unlimited.

of the U.S.

<sup>1</sup> Constitution, Article V.

<sup>2</sup> In 1861, in order to conciliate the Southern States then bent on secession, a constitutional amendment was passed by two thirds of both

carries great weight as the plighted faith of the past generation to the small States, and it is not at all probable that it will ever be changed. Nor is it evident, despite its inconsistency with the democratic principle, that it ought to be changed. Equal representation of the States, as Mr. Bryce points out, has its advantages. It gives a distinctly different basis of representation from that of the House, a matter which has been difficult to obtain in upper houses in Europe; and the Senate, by means of it, forms a strong connecting link between the State governments and the National Government. The Senate is a part of the National Government, but its members derive their titles to their seats from the States as separate political communities.<sup>1</sup>

The Senate has three distinct classes of functions:

1. Legislative; 2. Executive; 3. Judicial.

1. *The Legislative Function of the Senate* is to act as a co-ordinate branch of the national legislature. Its con-

The  
Legislative  
Function of  
the Senate.

sent is necessary to the passage of bills which become law. It has all the legislative power that the House has. It may not originate a revenue bill, but it may amend such a bill and by this means be as influential as the House in determining its final form. Allowing to the House the exclusive privilege of originating money bills was a concession to

Houses and ratified by a few legislatures, guaranteeing that congressional power should never be used to interfere with slavery in the States. The constitutional limitation on congressional power over slavery was then generally recognized by all parties, but it was not specifically stated in the Constitution. The further guarantee of the proposed constitutional amendment was merely the promise of the sovereignty for that day that the power referred to would not be exercised. In the next generation the sovereign nation might have changed its mind and, by a two-thirds vote in Congress and the ratification of three fourths of the States, might have disregarded the limitation which it had imposed upon itself. An unamendable part of a Constitution is inconsistent with sovereignty. The sovereign power can have its own way under the law.

<sup>1</sup> Bryce, *Commonwealth*, vol. i., p. 109.



the large States in return for the concession that the small States should have equal representation in the Senate. When it was subsequently changed so as to allow the Senate to amend revenue bills the concession of the small States came to nothing. It was thought the Senate represented the people as much as the House and should have equal powers. The Senate holds that a bill to repeal or reduce taxes is not a bill to raise revenue, and that it may originate such a bill, though by its passage new taxes may be made necessary. In 1894, the Wilson Tariff Bill that came from the House was changed by the addition of one hundred and forty-three amendments. Its friends in the House could then hardly recognize it, and President Cleveland, who favored the original bill, refused to sign it.

2. *The Executive Functions of the Senate* are:

- (1) Participation in the appointing power;
- (2) Participation in the treaty-making power.

Appointments and treaties made by the President must be confirmed by the Senate. If two-thirds of the Senators present do not vote to confirm a treaty, it falls to the ground. Appointments are confirmed by a majority vote.

In the performance of these functions the Senate goes into *Executive Session*. This is a secret session, a survival of the early practice; for during the first five years of the Senate's history, till February, 1794, all the sessions of the Senate were in secret.<sup>1</sup> It was thought the public must not know of, or be allowed in any way to interfere with, their proceedings. In an executive session the galleries are cleared, the doors are closed, and the obligation of secrecy is imposed on every Senator, who becomes liable to expulsion if he disclose the confidential proceedings. Newspaper reporters, however, have a keen scent, and they often

Executive  
Session of  
the Senate.

<sup>1</sup> Foster on the Constitution, p. 492, vol. i.; see Maclay's *Secret Journal*. The Constitutional Convention of 1787 held secret sessions.

find out and publish what occurs in secret session. The newspaper men will not give away the "leaky" Senators, and a Senator who will betray the secrets of the session will swear falsely upon investigation; so it has been found impossible to punish any one for betrayal. The difficulty of securing secrecy has arisen chiefly in cases of appointments and not so much in cases of discussions on treaties. There is a general demand that the executive session be held in the open; but this movement has been blocked by some Senators. "The black sheep of the Senate love darkness because their works are evil; other members of undoubted respectability defend the present system because they think it supports the power and dignity of their body."<sup>1</sup>

3. *The Judicial Function of the Senate* consists of its sitting as a court for the trial of impeachment cases brought up by the House.

Originally, the Senate was looked upon chiefly as an executive body. Hamilton spoke of the executive au-

**The Senate  
Originally  
Chiefly an  
Executive  
Body.**

thority as being divided between two branches, the President and the Senate.\* The Senate was to be a small body of twenty-six members who would sit and consult with the President on

appointments and treaties and collateral phases of executive business. In the earlier days of the Senate the Senators were looked upon largely as ambassadors from the States. The President and Cabinet ministers frequently consulted in person with the Senate. An effort was made to revive this practice under Madison, who declined an invitation from the Senate to consult with it on foreign affairs. Its legislative functions were not then relatively of so much importance as its executive functions. It did not become co-ordinate with the House in legislation until after 1816, when its standing committees were created.

<sup>1</sup> Bryce, vol. i., p. 105. \*See the *Federalist* on this topic, Nos. 61-65.

This idea as to the chief function of the Senate came from colonial traditions. The upper houses of the colonial legislatures were Governors' Councils. They were largely for administrative purposes. These colonial Councils, or Senates, were to consult with the governors as to appointments and as to checks on the Assemblies and the advice to be sent to the home Government. Usually they were not popular bodies, but were dependent upon the Governor or the Crown, though in some Colonies they were elected by the lower House. These lower houses usually determined upon taxes, appropriations, salaries, and new laws, subject to the royal veto. So with the new United States Senate. It was to check and revise legislation, like the English House of Lords, or the colonial Council, but not to enter originally into the merits and policy of new laws. It was the presumption that public policy and legislation would be determined in the House; that a bill which passed the House would pass the Senate unless it were plainly unconstitutional or flagrantly opposed to the public interest. The Senate should intervene to stop a measure on the same principle that the early Presidents used the veto.<sup>1</sup> That the majority of the Senators did not like a measure was not to be taken as sufficient reason for their voting against it. The Senate was to restrain the House, but not to take its place in legislation.<sup>2</sup>

<sup>1</sup> See p. 149.

<sup>2</sup> "At the origin of the Government, the Senate seemed to be regarded chiefly as an executive council. The President often visited the chamber and conferred personally with this body; most of its business was transacted with closed doors, and it took comparatively little part in the legislative debates. The rising and vigorous intellects of the country sought the arena of the House of Representatives as the appropriate theatre for the display of their powers. Mr. Madison observed, on one occasion, that, being a young man, and desiring to increase his reputation, he could not afford to enter the Senate; and it will be remembered that, so late as 1812, the great debates which preceded the war and aroused the country to the assertion of its rights, took place in the other branch of Congress. To

Hamilton set forth the following purposes in the creation of the Senate:

1. To conciliate the spirit of independence in the States by equal representation. This was an end obtained but not a purpose put forward in the outset.<sup>1</sup>
2. To create a council qualified by size to advise and check the President in appointments and treaties.
3. To restrain the House, guarding against passion and sudden changes in the people.
4. To provide a body of stability, character, and continuity in policy; of men who are of larger experience, of longer terms, and more independent of popular election.
5. To establish a court for impeachment.

The Senators are elected by the legislatures of their respective States. Until 1866, each State legislature was left free to elect its Senators in its own way.

Method of  
Electing  
Senators.

"The times, places, and manner" of choosing Senators "shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations except as to the places of choosing Senators."<sup>2</sup> In 1866, a Federal law was passed providing for the present method of electing Senators. It requires that each House of a State legislature shall first vote separately for the election of a Senator. If the choice of both houses does not fall on the same person, the houses shall then meet in joint session and shall proceed to vote *viva voce*, a majority of

such an extent was the idea of seclusion carried that when this chamber [the room now occupied by the Supreme Court] was completed, no seats were prepared for the accommodation of the public. But now the Senate, besides its peculiar relations to the executive department, assumes its full share of duty as an equal branch of the legislature."—Vice-President Breckinridge to the Senate on their leaving the old chamber for the new, Jan. 4, 1859, *Congressional Globe*, 1858–59, Part I., p. 203, cited in Foster on the Constitution, vol. i., p. 491. See Furber's *Precedents Relating to the Privileges of the Senate*; Lieber, *Civil Liberty*, chap. xiii.

<sup>1</sup> See p. 202.

<sup>2</sup> Constitution, Art. I., Sec. 4, Cl. 1

each house being present,' and a majority of the whole legislature shall be required to elect. At least one vote daily shall be taken until election is made.' These provisions may lead to the breaking of a quorum and to the senatorial deadlock in the State legislature. If a party majority for a candidate be very small, the members of the opposing party may absent themselves from the joint meeting of the legislature. Unless the majority party can have every one of its members present the quorum will be broken and no election can legally be held. If a third party should hold a small balance of power in the legislature, the legislature in joint session might ballot every day for months without electing.

Like the law of 1842, regulating the election of Representatives, this law grew out of a notable election controversy in the Senate. This case, like the one in the House, also came up from New Jersey. In the winter and spring of 1865, the legislature of that State seemed unable to elect a Senator. After many efforts at election it was found that no candidate could get "a majority of the votes of the members elected to both houses of the legislature," which was described in New Jersey as the rule of election. It was then decided, in convention of the two houses, to rescind this rule, and it was declared that "any candidate receiving a plurality of votes of the members present shall be declared duly elected." The

<sup>1</sup> See *Atlantic Monthly* for August, 1891, article by W. P. Garrison.

<sup>2</sup> Senator Fessenden of Maine objected to the *viva voce* vote as liable to put men under restraints from party discipline, which would lead them to act against their conscientious convictions of what was right and proper in the individual case, and which might bring a sort of compulsory pressure upon them that might be objectionable. Senator Trumbull of Illinois argued that constituents had a right to know how members voted; there will be no chance to cheat by false or double ballots; instructing constituents had a right to know that their mandate was obeyed. In the discussion Senator Anthony advocated open voting, not only in the election of Senators, but at the polls: "It prevents corruption, prevents deception, and cultivates a manly spirit everywhere."

legislature consisted of a Senate with twenty-one members, and a House with sixty members. The resolution to elect by a plurality was carried in the joint convention by a majority of one; of the House members thirty voted for it and thirty against it. It was therefore shown that the result could not have been carried with the two houses voting separately, in regular legislative form. Under this plurality rule John P. Stockton, the Democratic candidate, received forty votes, John C. Ten Eyck, the Republican candidate, received thirty-seven votes, and four other candidates, one vote each. Thus there were forty-one votes, a majority, against Stockton, but as he had received a plurality, he was declared duly elected. Mr. Stockton took his seat on the first day of the next session of the Senate, and was regularly sworn in. Thirty-seven members of the New Jersey legislature sent to the Senate a protest against Mr. Stockton's being allowed to retain his seat in the Senate. They claimed that a Senator must be elected by the legislature, and a minority could not constitute the legislature. "The consequences which are possible," they urged, "from admitting the right to elect by a plurality vote furnish a conclusive argument against it. If two members vote for one person and every other member, by himself, for different individuals, the person having two votes would have a plurality. Can it be that in such a case he would be Senator? This, indeed, is an extreme case, but such cases test the propriety of legal doctrine, and many equally unjust but less extreme cases may easily be offered."<sup>1</sup> The Judiciary Committee of the Senate, consisting of five Republicans and two Democrats, reported, with only one dissenting Senator,<sup>2</sup> that "Mr. Stockton was duly elected and entitled to his seat."<sup>3</sup>

<sup>1</sup> See Blaine's *Twenty Years of Congress*, vol. ii., pp. 154 *et seq.*

<sup>2</sup> Senator Clark of New Hampshire.

<sup>3</sup> A summary of Senator Fessenden's argument against this report is interesting from the constitutional point of view. The legislature, in the

After much parliamentary wrangling the report was rejected, and by a very close vote Mr. Stockton was denied a seat in the Senate. The vote was largely the result of the fierce partisan spirit of the time. Mr. Blaine says:

“In the decision itself, however, there has been general acquiescence, and it led to an important reform in the manner of choosing United States Senators. The well-known Act of July 26, 1866, regulating the time and manner of holding elections for Senators in Congress, was the direct fruit of the Stockton controversy. The reluctance to interfere with the supposed or asserted rights of States had too long delayed this needful exercise of national power. It thus came to pass that many methods were developed in different States for choosing Senators,—methods that widely differed in their essential characteristics. Hence there was variety, and even contrariety, where there should have been only unity and harmony. These divergent practices had been allowed to develop for seventy-seven years of the nation’s life, when, admonished by the Stockton case of the latitudinary results to which loose methods

election of a Senator, is merely the agent of the Constitution of the United States. It is therefore under the control of no other power. No provision of the constitution of New Jersey nor any law of a previous legislature directing the mode in which a Senator shall be elected would in any way bind the legislature which is to perform this act. The legislature is independent of everything except the Constitution of the United States. But although thus independent of State control, when it acts in the election of a Senator it must act as a legislature; its act must be a *legislative act*. It is essential to a legislative act that it be performed by the two Houses acting separately. The legislature may vote to form a convention for the purpose of choosing a Senator, but if the ordinary and received law of electing in this convention is to be changed, the legislature and not the convention is the proper body to change it. And when the legislature created a body other than itself, though constituted of the same members, a convention to choose a Senator, that body must proceed in the choice of a Senator according to the universally received parliamentary and common law upon the subject of elections. The convention in New Jersey, unauthorized by law, undertook to change this acknowledged parliamentary and common-law process and to elect in a different manner from that prescribed, namely, by a plurality vote. See *Congressional Globe*, vol. 70, p. 1567, 1st Sess., 39th Cong., March 22, 1866.

might lead, Congress took jurisdiction of the whole subject. The exercise of this power was a natural result of the situation in which the nation was placed by the war. Previous to the civil conflict every power was withheld from the National government which could by any possibility be exercised by the State government. Another theory and another practice were now to prevail; for it had been demonstrated to the thoughtful statesmen who then controlled the Government that everything which may be done by either nation or State may be better and more securely done by the nation. The change of view was important and led to far-reaching consequences."<sup>1</sup>

While this change in the legislative election of Senators is accepted as a suitable improvement over the former diverse methods, there has not, however, been acquiescence in the original provision committing the election to the legislature.

The present method has aroused great opposition and severe criticism. It has been called "one of the most corrupting elements in our national political system."<sup>2</sup> Every vote in the Senate is a bone of contention between the national political parties, and these parties, therefore, through their national organizations strive to control the various State legislators by whom the Senators are elected. This means that parties in the States are made to coincide with parties in the nation; that legislatures are to be chosen, not with reference to the needs and interests of the State, but with reference to the election of a United States Senator; that the people of the State cannot divide naturally on questions of local interest and importance, but are divided artificially by the greater or more dominant interests of national parties; that in voting for State legislators we are led, not to vote for the

Objections to  
Electing  
United States  
Senators by  
State  
Legislatures.

Influence of  
National  
Parties on  
the Choice  
of State  
Legislatures.

<sup>1</sup> Blaine, *Twenty Years of Congress*, vol. ii., p. 160.

<sup>2</sup> W. P. Garrison, *Atlantic Monthly*, August, 1891.



best and most competent men who would take the best care for the interests of the State, but to vote for the man of certain party allegiance, that he may vote for a Senator who will promote the party policy which we wish to see successful in the nation. This practice has had great and decisive influence in our history in promoting a tendency toward nationalization or consolidation. It centres the attention and interest of the citizen upon the affairs of the nation, and reduces his interest in the affairs of his State, to the great detriment of good local government. Therefore this method of electing Senators, it is said with some truth and force, is chargeable with the deterioration of State legislatures, with the growth of machine rule, with the purchasability of Senatorships, and with the decline of the United States Senate itself. Not only are State legislators elected primarily for the purpose of electing United States Senators and only secondarily to attend to the business of the State, but frequently the whole time of the legislature is taken up with prolonged and sometimes fruitless efforts to elect a Senator, and the business of the State is entirely neglected.<sup>1</sup>

To the Injury  
of Good Local  
Government.

The problems of State governments are by no means

<sup>1</sup> "Originally framed for the purpose of securing a 'select appointment,' it has, in its results, ended in being the means by which vested interests most easily obtain an influence in our Government. At this moment (1898) certain Senators are understood to represent sugar, or silver, or steel, or railroads, and this is due, as boldly expressed in a remark credited to Jay Gould, to the fact that it is cheaper to buy a legislature than it is to buy a people, and therefore this branch of our Government is at once the cheapest and easiest means by which special interests may secure representation."—Paul Leicester Ford's edition of the *Federalist*, p. 409, note. See also Haynes's *Popular Election of United States Senators*, 1893. See two articles for and against election of United States Senators by the people, *New York Independent*, May 31, 1900, by Senator W. A. Harris of Kansas, and Senator William E. Chandler of New Hampshire. Also ex-Senator George F. Edmunds in *The Forum*, vol. xviii., Senator John H. Mitchell, *Forum*, vol. xxi., and C. H. Fox in *The Arena*, May, 1902.

the same as the problems of the National government, and there is no reason why the two should be mixed as they now are in the election of Senators. The legislative candidate who represents the best man for the Senate may be altogether unfit for the office of legislator. The voter cannot vote intelligently when he is compelled to vote on two wholly different sets of questions at the same time, yet that is what every voter is compelled to do when he votes for State legislators to elect United States Senators.

The result is that a strong demand has arisen for the election of Senators by a direct vote of the people. This would leave the State legislature free to attend to its own business. It is thought that this method would obviate the objections which we have recited, and that it would especially tend to prevent the securing of a senatorial seat by bribery, as a millionaire corrupt candidate could not bribe the whole people of a State, while he might conveniently bribe a few members of a legislature,—enough to turn the scale in his favor.

This change would necessitate a constitutional amendment. The difficulty of securing such an amendment will probably result in its never being brought about in that way. But the change may be brought about in effect—in fact, it is being brought about—by a change in custom and usage, that is, by the law of the unwritten constitution. In the famous senatorial contest in Illinois, in 1858, between Lincoln and Douglas, each party nominated its candidate in a State convention. The people knew beforehand that if the Republicans carried the legislature Lincoln would be elected Senator, and if the Democrats carried the legislature Douglas would be elected Senator. So the popular election in November was like a political mandate from the people

Would Popular Election Tend to Restrain Corrupt Practices?

The People may Secure Direct Election of Senators by a Change in the Unwritten Law of Political Custom.

to the legislature to elect a certain man Senator. Frequently since 1858, political party conventions in various States have nominated their candidates for the Senate in this way, and the party majority in the legislature have subsequently merely ratified the nomination. In 1898, Senator Hanna of Ohio was so nominated by the Ohio Republican State Convention. A few Republican members-elect of the legislature refused to support Senator Hanna, and they were regarded as recreant to their party obligations. If this custom should become general and fixed, it would place the virtual election of Senators in the party conventions, and the party majority in the legislature would be like the Electoral College, merely a ratifying body, bound to elect the one already determined upon. It is conceivable that this practice may easily grow up and be just as binding upon the members of the legislature as the choice of the party candidate for President is now binding upon the members of the Electoral College. This would be an approach toward popular election, provided only that the people of the dominant party were able to control the nominations through their party machinery by a good primary nominating system; otherwise, it might result in the virtual election of Senators by a clique of party bosses and managers of the machine.

There is another way by which custom or independent State action may modify, or entirely change, the choice of United States Senators. The constitution of the State of Nebraska allows the voters in voting for members of the State legislature to "express by ballot their preference for some person for the office of United States Senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for State officers." Under such a regulation, which could be provided by statute law in any State, any party of citizens could nominate a

Or by the  
Independent  
Action of  
the States.

suitable candidate for the Senate and have him voted for in all the counties. It is true the legislature would not be bound by law to elect him, though he should receive a majority of all the votes cast, yet custom and public expectation and the political mandate which comes with a popular majority are very effective, and it would soon come to pass, as it has with the Electoral College, that the legislature would invariably ratify an election so ordered by a popular vote. This is what is meant by the "actual forces in politics" and the "law of the unwritten constitution" prevailing over the law of the written Constitution. The legislature would continue to elect United States Senators only in name.

In fact, the legislature's power of election is only nominal, as it is. The actual election is already made by the party caucus of the legislature before the legislature meets. If the Republicans carry the majority of the members of a legislature in any State election, the majority of the Republican legislative caucus will elect the Senator. All the Republican members of the legislature must go solid for the caucus candidate or they may not be able to elect their man. The legislature then merely goes through the form of ratifying the nomination of the caucus.

It is the present practice in most of the States that when a senatorial vacancy approaches, aspirants announce themselves, or let it be known among their friends that they are candidates for the place. The candidate then enters actively into the electoral campaign, making speeches throughout the State, and his friends in the various counties seek to secure the nomination and election of legislative candidates pledged, or favorable, to his interest. Sometimes, preceding an election, candidates for the legislature are expected to declare for which senatorial candidate they will, if elected, give their votes. And it is now coming

**The Actual Election is by the Party Caucus, not by the Legislature.**

**Methods of Senatorial Candidates.**

to be the practice, unfortunately, that the party majority in the legislature feel disposed to limit their choice to the candidates who have previously announced themselves, and who have gone upon the stump in their own interests. This custom limits the discretion of the legislature without doing anything to promote a true and popular choice, for it frequently happens that the best men, men who would reflect great honor on their State in the Senate, and whom the masses of the party would delight to honor, will not announce themselves as candidates and make a campaign for the place.

The Senate has no rule for the closing of debate. To move the previous question for the purpose of shutting off debate and bringing the pending question to a vote would be out of order in the Senate.<sup>1</sup>

Cloture in the Senate.

This comes partly from what is called the dignity and courtesy of the Senate. The idea is that the Senate is too dignified a body, and desires to repose such confidence in its members and show them such deference and courtesy, and expects such deference and courtesy in return, that it is not to be presumed that any honorable Senator (and all Senators are honorable men) will be guilty of abusing his freedom and his privilege; it is not to be supposed that a Senator would seek to address the Senate when he has nothing to communicate—that he would seek to talk merely to kill time.

It has been found repeatedly that this senatorial courtesy, or this confidence in the honor and good faith of the Senators, is misplaced. They occasionally resort to the privilege of unlimited debate for filibustering purposes, to wear out the majority and to stave off or defeat the pending measure. The Lodge Federal Elections Bill was defeated in this way in 1890. Senator George of Mississippi held the floor for two or three days, between repeated adjournments, to prevent the bill

Filibustering in the Senate.

<sup>1</sup> On cloture in the Senate, see Bryce, vol. i., p. 104.

from coming to a vote. And in 1893, on the bill to repeal the compulsory silver-purchase clause of the Sherman Act of 1890, when the majority were intent on remaining in session to force a vote, Senator Allen of Nebraska spoke consecutively for fourteen hours,—throughout the whole night. Eight or ten Senators with such lung power, who will relieve one another in such a contest, can usually force the majority to consent to adjournment, or to take up some other business. When it comes, like this, to a contest of physical endurance, the small minority have a decided advantage. They need only keep three or four Senators on guard; the others of like mind may absent themselves, sleep, and rest, and so prepare themselves for their service in turn, while their absence helps to break the quorum. But the majority members wishing to pass the measure must be present; otherwise the business of the Senate is brought to a standstill, as the filibusters desire; for a filibustering minority speaker, when he sees that a quorum is not present, can rest from his speech until the majority are waked up and brought in. So the majority can only sleep on their arms, that is, on their desks; and they are constantly subject to having their rest disturbed by a roll-call to which they must answer.

It must be understood that these practices are very rare, only to be resorted to in extreme cases, when the minority feel that their cause justifies their resort to this filibustering weapon. There are some things to be said in favor of leaving open this procedure as a defence for the rights of the minority. It is only on matters of deep and vital interest to their constituents that Senators would feel called upon to make such protest and combat against the majority. Usually the Senators have too much respect for their colleagues and for the dignity and courtesy of the Senate to abuse the privilege of the freedom of debate, and it cannot be said that the country has ever seriously

suffered from the conduct of the minority in the exercise of their privilege of unlimited debate. The United States Senate still holds its place as one of the most worthy and honorable legislative bodies in the world.<sup>1</sup>

The Senate, however, has it in its power to adopt such rules as will curtail debate and force a vote. It is, however, very reluctant to use this power, and it will do so only when necessity requires. It might by rule require its chairman to put the motion after a limited time; or set a day on which the main vote shall be taken, or it might again introduce into the proceedings the previous question, though this rule has long been obsolete. The Senate's rules, however, are designed rather for the purpose merely of preserving order, allowing freedom of discussion, and for the protection of the minority. The Senate proceeds on the principle that if hasty and ill-considered legislation is to be prevented the broadest freedom of debate must be allowed.<sup>2</sup>

*The Courtesy of the Senate* is a term applied to the system, or practice, of mutual support that the Senators give to one another, especially in the confirmation of appointments. This courtesy arises from the desire of the Senators, grown into a habit, to defer to and support one another where their personal interests are concerned. It helps to secure for a Senator a great degree of personal consideration and concession from his colleagues so that a Senator can have about what he pleases from his fellow-Senators. This courtesy operates to restrain Senators from applying the previous question to shut off debate by their colleagues. A Senator may have spoken twenty times upon a measure, and may have abused the Senate's indulgence, but if he seeks to speak

<sup>1</sup> On Senatorial Courtesy; see also p. 157.

<sup>2</sup> See Foster on the Constitution, vol. i., pp. 493-494; Furber's *Precedents Relating to the Privileges of the Senate*; the Senate's *Proceedings* in the summer of 1894.

again and again, the Senate, out of "courtesy," will not refuse him the opportunity. Courtesy may even lead Senators to vote for a measure or a special bill, out of desire to please an associate.

But the chief application of senatorial courtesy is found in the support Senators give to one another in order to control the Executive appointments. When the Constitution conferred upon the President the power to make appointments and on the Senate the power to confirm appointments, it was clearly understood that the President should decide who should be appointed, and that the Senate should check him in the exercise of this power only when clearly unfit men were named for office. It was not intended that Senators should dictate appointments or even recommend men for places. It is now one of the understandings of our politics, an illustration of our unwritten constitution, that the President's appointments to Cabinet positions will be confirmed in the Senate without question. The President has a perfectly free hand in choosing his official family, and unless a palpably unfit nomination be made the Senate will confirm without question.<sup>1</sup> This, it was supposed, originally, would be the way with all presidential appointments. But the Senate soon came to the practice of rejecting nominees of the President on any ground it pleased,—because of party reasons, or because it disapproved of the party record of the nominee, or because a majority of Senators wished to spite the President. Then the Senators began to claim for themselves the right to dictate appointments or removals in their respective States.

<sup>1</sup> In 1869, President Grant nominated Mr. A. T. Stewart, the merchant prince of New York City, to be Secretary of the Treasury. Mr. Stewart as Secretary would have had, by the rulings and management of his department, opportunity to affect his own interests as a heavy importer. This made him legally ineligible, and when attention was called to this in the Senate the President withdrew the nomination.



"When I came into public life in 1869," says Senator Hoar, "the Senate claimed almost entire control of the Executive function of appointment to office. Every Senator with hardly an exception seemed to fancy that the national officers in his State were to be a band of political henchmen devoted to his personal fortunes. What was called the Courtesy of the Senate was depended upon to enable a Senator to dictate to the Executive all appointments and removals in his territory."<sup>1</sup>

It thus came to pass that when the President came to appoint men to office, in New York and Ohio for instance, it was supposed that the Senators from these States would know best whether the appointments were fit to be made. If these Senators advised rejection, their colleagues, remembering that they might some time wish the return of the favor, deferred to their advice and rejected the nominations. This deference of the Senators for one another, by which they are led to confirm or reject appointments according to the advice of the Senators from the States in which the appointments are made, is the most prominent manifestation of senatorial courtesy. The Senators, standing together in this way, can put pressure upon the President. They insist that before making a nomination to an office in any State the President shall consult his party friends from that State, usually the party Senators and Representatives, and be guided by their wishes. A Congressman will recommend to the President nominees for postmaster in the various cities and towns of his district, and the Senators will recommend men for more important appointments within the State.<sup>2</sup> Such an arrangement for the Senators benefits them all alike, because each obtains in this way an

<sup>1</sup> Senator Hoar, *Congressional Record*, 53d Congress, vol. xxv., p. 137, April 8, 1893. Cited in Foster on the Constitution.

<sup>2</sup> If the State has no Senator of the President's party, the President will be apt to consult the party Representatives from that State, or the chairman of the party State Committee, or other leading party men.

important share of Presidential patronage within his State. "You help me to control the party appointments in my State and I will help you to control the party appointments in your State." This has led to serious abuses, until "courtesy" has become a reproach. Executive appointments are practically made by Senators and Congressmen, and of course they use these offices to promote or secure their political fortunes. We now see what would have been to Hamilton and Madison and Washington an astounding spectacle,—the party Senators meeting at a State capital with the applicants for office, to make arrangements for the distribution of the offices. Who shall be Postmaster at Vincennes or Schenectady? or District Attorney for Southern Illinois? This purely Executive business the Senators now undertake to determine. Their time and energy are largely given up to satisfying applicants for Executive appointments, and, through their placemen, to building up personal political machines. The question is, not whom the President will appoint, but to whom the Senators and Congressmen will assign the Federal offices within the State. The President has virtually surrendered the Executive power of appointment to members of the national legislature. If the President refuses to be guided by senatorial dictation he runs the risk of having his nominations rejected by a combination of party Senators against him. Also, the Senators, if disappointed in their efforts to control the Federal patronage within their respective States, would oppose the President politically; they would seek to embarrass his administration and to defeat his renomination.<sup>1</sup>

<sup>1</sup> "The Senate has never confirmed the nomination of a postmaster against the will of the Senator who lived where the office was situated. It insists that each of its members shall select the man who delivers to him his mail. On this principle President Cleveland conceded to Senator Hill the right to name the Postmaster at Albany, New York, and Sumner secured from Lincoln the appointment to the Boston Postoffice of the historian Palfrey."—Foster on the Constitution, vol. i., p. 493.

This courtesy of the Senate could not have come into use, of course, except by the spoils system,—*i. e.*, the use of the Federal offices for party and personal purposes. Under this use of the spoils through senatorial courtesy, the State is regarded as the rightful domain of the feudal baron,—the party Senator from that State,—and his political underlords are to be selected by himself. These appointees must, therefore, be the Senator's men. They must work for him, either to secure the nomination of acceptable candidates for the State legislature, or, if the Senator be a candidate for President, to secure the appointment of favorable delegates to the National Convention. The Presidents have usually yielded to this senatorial usurpation, or have been disposed to accept it as a desirable and practicable means of strengthening the party within the several States. To nominate a man to an important office within a State who is distasteful to the party Senator from that State, or who is not attached to the Senator's political fortunes, is an offence to the Senator; and by senatorial courtesy the Senators have combined to defeat, and to protect themselves against, such appointments. This was the cause of the famous quarrel, in 1881, between President Garfield and Senator Conkling of New York. The President nominated as Collector of Customs in New York City, an officer having many hundred subordinates, a gentleman distasteful to Senator Conkling. This Customs Collector could not be depended on to work in the interest of the Conkling wing of the Republican party in that State. This appointment so offended Senator Conkling and his Republican colleague, Senator Platt, that, as a protest, they resigned their seats in the Senate. They saw that senatorial courtesy would not prove strong enough to lead a majority of the Senate to stand by them for the rejection of the President's nomination. If these irritated Senators had been sustained by re-election to the Senate

by the New York Legislature they would have been in a position seriously to embarrass, if not to disrupt, the party administration in New York. In this case the Senators were defeated and the President proved too strong for senatorial courtesy.

In President Cleveland's second administration Senator Hill of New York succeeded, by force of senatorial courtesy, in defeating two of Mr. Cleveland's nominations for Associate Justiceships of the Supreme Court. The Senator could not force his choice on the President, but he could for a time defeat the confirmation of the President's choice. Finally, the President nominated Senator White of Louisiana, and then senatorial courtesy worked in his favor; for it is the uniform custom of the Senators courteously to confirm the appointment of one of their own number, and that, too, without the usual reference to the Judiciary Committee for investigation.

*The Dignity of the Senate* relates to the honor and respect which the Senate assumes by its forms and behavior.

**The Dignity of the Senate.** It seeks to cultivate those qualities, or aspects, of the Senate designed to promote the position and reverence due to the body. It involves exclusion and privilege. It requires that a Senator's honorable position shall be respected. Outsiders and spectators must not be familiar. They may not only not take part in the proceedings, but they may not indicate by any applause or sign of dissent that they are aware that there are any proceedings. They may make no demonstration of any kind to influence or control the assembly. Otherwise the Senate might lose its personality, individuality, and dignity, and be reduced to a mass-meeting, or common political gathering. It is thought that in late years the Senate has declined in this respect, as it has frequently allowed crowded and excited audiences to applaud and hiss in its galleries; and it has been asked whether we are approaching the time when the gallery loafer will be

allowed to arise and correct the orator on the floor of the Senate, or interrupt him by interjections.

When the Senate divides or votes on a question, the roll of the Senate is called alphabetically. The Senators may vote *viva voce*, or, in accordance with the Constitution, one fifth of the Senators present may demand that the Yeas and Nays be entered upon the journal. In the British Parliament the members, in a division, pass into the lobby and are counted as they pass between two tellers.

Divisions in  
Senate.

On the matter of impeachment the Constitution provides that:

Provisions of  
the Constitu-  
tion on Im-  
peachment.

(1) The Senate shall have the sole power to try impeachments.

When sitting for this purpose the Senators shall be on oath or affirmation.

(2) The House has the sole power to impeach.

(3) When the President is tried on impeachment the Chief Justice shall preside.

(4) A two-thirds vote is necessary to conviction.

(5) Judgment in case of conviction extends only to removal from office and disqualification to hold any office of honor, trust, or profit under the United States; the party convicted shall be liable to indictment, trial, judgment, and punishment according to law.

(6) The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

In the making of the Constitution there were objections to conferring the power of trying impeachments upon the Senate: (1) It would unite legislative and judicial functions. (2) It would unduly accumulate power in the Senate and tend to establish an aristocracy. (3) The Senators would judge too leniently officers for whose confirmation

Original Objec-  
tions to Mak-  
ing the Senate  
the Court in  
Impeachment.

they had voted. (4) Senators might be called upon to try one another for corrupt use of the treaty-making power.<sup>1</sup>

These objections were all answered in the *Federalist*, and experience has proven them untenable.

It was suggested in the Convention of 1787 that the Supreme Court would be a better tribunal than the Sen-

The Supreme Court suggested as the Court of Impeachment. ate for impeachment trials, especially for the trial of the President; for, if the Senate were allowed to remove the President on impeachment preferred by the House, this would make

the Executive too dependent on the legislative department, and would interfere with the President's power to check the legislature. It was answered that the judges would not form a competent court for presidential impeachment, as they were dependent on the President for appointment. It was understood, when the Senate was given the power to try impeachments, that the Senators

In Impeachment Cases the Senate Is to Act in a Purely Judicial Capacity. were on their oaths to act, not from any political or party bias, but entirely in a judicial capacity,—as impartial judges. That the Senate may be depended upon to show a fair and

judicial disposition in this respect was demonstrated in the celebrated impeachment trial of President Johnson. Seven Republican Senators voted, not for conviction, as party pressure was urging them to do, but for acquittal, as they judged the law and the evidence demanded.

Only the President, Vice-President, and "civil officers" of the United States can be impeached. Who are "civil officers of the United States"? The word Who are Impeachable? "civil" is used in contradistinction to "military," consequently officers of the army and navy are exempt from impeachment. The reason for exempting

<sup>1</sup> On the subject of impeachment, consult Foster on the Constitution, and the *Federalist*, Nos. 65 and 66.

military and naval officers is that they are subject to trial and punishment by military law and usages.<sup>1</sup>

Senators and Representatives are not "civil officers of the United States" and are therefore not impeachable.<sup>2</sup> This was the decision in Blount's case in 1798. The only remedy for the misconduct of a member of either House of Congress during his term of office is expulsion by his colleagues. In Blount's case, while impeachment was pending, he was expelled from the Senate for the offence charged against him. After his expulsion Blount pleaded in his impeachment trial that the Senate had no jurisdiction. The Senate sustained this plea by a vote of fourteen to eleven, and the impeachment was dismissed. Wharton says: "In a legal point of view all that this case decides is that a Senator of the United States who has been

<sup>1</sup> Story on the Constitution, § 792, cited by Foster, p. 570.

<sup>2</sup> The Congressmen represent the people; they receive their commissions directly from the people. They are the officers of the people of a State, and not of the United States. They may do official duty with reference to the United States, as some other State officers do now; but they are still officers of the State. The Senators represent the sovereignty of the several States; they represent the States, and as such are officers of the States and not of the United States. So that a Senator is not impeachable in that he is not an officer of the United States. A Congressman is not impeachable, in that he is not an officer of the United States, but an officer of the people of a State. It leaves it, then, that those cognizable "before this Court are only those who are the government officers of the United States; who are officers alike for every State; who receive their powers alike from every State, directly or indirectly; who are commissioned by the people of all the States, through some person representing the people of all the States. So that the officers of the United States are those included in the Executive department of the Government, and every officer of that Executive department we conceive to be impeachable before this tribunal."—Manager G. A. Jenks in the Belknap case, p. 172; cited by Foster, p. 573. For the opposing view Foster cites "the able argument of Bayard and Harper in Blount's case," Wharton's *State Trials*, pp. 266-272, 302-314. In the conventions that ratified the Constitution, C. C. Pinckney and Randolph spoke as if a Senator could be impeached.—Elliot's *Debates*, vol. iv., pp. 263-265; vol. iii., pp. 202, 402.

expelled from his seat is not, after such expulsion, subject to impeachment."<sup>1</sup>

"That the members of either House of Congress should be impeached by, or before, the other, or that an officer whose duties are legislative should be called in question elsewhere for official acts, could never be tolerated, and is repugnant to the nature of the office itself."<sup>2</sup>

Can an officer of the United States be impeached after he is out of office for acts done while he was in office?

May an Officer Escape Impeachment by Resigning? The answer to these questions will depend upon the view taken of the purpose and scope of impeachment.

May an ex-Officer be Impeached? or a Private Citizen? One view holds that civil officers only are impeachable for indictable offences only, and that while actually in office.

The other view holds that impeachment may apply even to political offences which cannot be reached by the courts, and may even extend to offences against the peace and welfare of the State committed by private citizens.<sup>3</sup> This would give a very wide extent to the power of impeachment, and would put a very dangerous weapon in the hands of a dominant party as against a rising leader of the opposition whom the party in power deemed to be

<sup>1</sup> Wharton's *State Trials*, p. 317, cited by Foster.

<sup>2</sup> Hon. George F. Hoar, one of the House Managers in the Belknap case.

<sup>3</sup> "Let us suppose that a citizen, not in office, but possessed of extensive influence arising from popular acts, from wealth or connections, actuated by strong ambition and aspiring to the first place in the Government, should conspire with the disaffected of our own country, or with foreign intriguers, by illegal artifice, corruption, or force, to place himself in the presidential chair. . . . What punishment could be better calculated to secure the peace and safety of the State than disqualification? . . . Such offences may be committed as well by persons out of office, and it may be as important to prevent such persons from getting into office as to remove them when in."—Manager Bayard in Blount's case, p. 567 in Foster on the Constitution.



dangerous. The best authorities are inclined to accept the view imposing the more restricted scope to this power.

Whether an officer can escape impeachment by resigning was discussed at length in the Belknap case.<sup>1</sup> In 1876, it was found that the Secretary of War, William W. Belknap, had been receiving from \$6000 to \$12,000 annually from the proceeds of an Indian post-tradership to which he had

May an Officer  
Escape Im-  
peachment by  
Resigning?

appointed the Indian agent. Belknap, as soon as this bribery was discovered, resigned, and the President accepted his resignation. A few hours after his resignation, five articles of impeachment were

The Belknap  
Case.

preferred against him, each charging him, in substance, with the acceptance of bribes. Belknap's attorneys entered the plea that at the time of the impeachment he was not an officer of the United States, and therefore the Senate had no jurisdiction. This plea was overruled by a majority of the Senate, but the majority was less than two thirds,—thirty-seven to twenty-nine. On the final vote the same Senators who voted to sustain the plea voted "Not guilty," on the ground of lack of jurisdiction pleaded by Belknap's attorneys. So, while a majority of the Senate held that an officer could not escape impeachment by resigning, yet more than a third of the Senate refused on that ground to vote for conviction. The effect was that Belknap by resigning escaped the punishment of impeachment, though the majority of the Senate opposed this view. This precedent, however, may not be decisive in future cases.<sup>2</sup>

Opposed to the view that an ex-officer or a private citizen may be impeached, it is said that the object of impeachment is to remove a corrupt or unworthy officer; if the term has expired or he is no longer in office that object is attained, and the reason

Argument as  
to the Scope of  
Impeachment.

<sup>1</sup> Foster on the Constitution, p. 574 *et seq.*

<sup>2</sup> Forty-fourth Congress, first session.

for his impeachment no longer exists; that the conjunction in the Constitution of removal and disqualification implies that removal precedes further punishment; if the officer has resigned he cannot be removed, and therefore cannot be punished; that if a private citizen can be impeached one day after his exit from office he may be at any time in his subsequent life; that this would put a terrible weapon in the hands of a dominant political party; that the House of Representatives in the Belknap case had dropped proceedings when the accused had resigned pending investigation to determine whether the acts were impeachable.

On the other hand, it is urged that if an officer, palpably guilty of fraud and malfeasance, can escape trial and punishment by resigning, this seems to make the impeachment clause nugatory and absurd; that while there is room for argument as to whether an officer can be impeached after he is out of office, it should be perfectly clear that to escape prosecution and penalty by a voluntary resignation cannot be permitted; it is especially desirable that such an officer should be forever after disqualified from holding any office of profit or trust.

The question has been raised whether the Senate has the power to suspend the accused from office during the trial. In President Johnson's trial, in 1868, Senator Sumner maintained that the Senate could suspend Johnson from the presidential office pending the trial. According to Sumner the reason the Constitution required the Chief Justice to preside in such a case was not because the Vice-President was an interested party, but because he was supposed to be exercising the President's functions.

It has been asked whether a subsequent Congress could reverse an unjust conviction. This question is purely academic; it has never been raised in practice, and it will probably never be necessary to raise it.

There have been seven impeachment trials before the United States Senate. Only two of these have resulted in convictions.

1. *Blount's Case*.—On July 7, 1797, William Blount, Senator from Tennessee, was impeached by vote of the House for high crimes and misdemeanors. On the following day he was expelled from the Senate. Articles of impeachment were not preferred at the bar of the Senate until the session of 1798. Blount was charged with creating and setting on foot, within the jurisdiction and territory of the United States, a hostile military expedition against the territories and dominions of Spain in the Floridas and Louisiana, for the purpose of wresting the same from Spain for the benefit of Great Britain with which Spain was then at war; he was charged, also, with inciting the Creek and Cherokee Indians, then inhabiting the territory of the United States, to commence hostilities against Spain in the Floridas and Louisiana, in violation of the peace and treaty existing between Spain and the United States; he was further charged with conspiring to alienate and divert the confidence of the Indians from the agent and interpreter appointed by the President.

Historic Cases  
of Impeach-  
ment in  
America.

Blount's Case.

The impeachment was managed for the House by James A. Bayard and Robert G. Harper. Jared Ingersoll and A. J. Dallas, in defence of Blount, entered a plea that the Senate had no jurisdiction, since Blount was not then, nor at the time of the offences charged, a civil officer of the United States. This plea was sustained by the Senate and consequently Blount was acquitted.<sup>1</sup>

2. *The Pickering Case*.—On March 3, 1803, the House impeached John Pickering, a Federal District Judge for the District of New Hampshire. He was charged with

<sup>1</sup> Blount returned to Tennessee, was elected to the State Senate, was made Speaker of that body, and was about to be elected governor of the State at the time of his death.—Foster on the Constitution, vol. i., pp. 530-531.

making decisions contrary to law, and with drunkenness and profanity on the bench. Judge Pickering's son entered a plea of insanity. The House managers held that the insanity was the result of habitual drunkenness. He was convicted and removed by a party vote, the Federalists voting for Pickering, but the disqualification to hold office thereafter was not imposed.

3. *The Case of Chase*.—Samuel Chase, one of the Justices of the Supreme Court, was impeached before the Senate in 1805. Chase was a partisan judge who had the habit, then not uncommon in England and America, of indulging in political harangues in his jury charges. He had incensed the Jeffersonian Republicans in the House by his conduct in certain trials under the Sedition Law. He was accused of arbitrary conduct, of refusing a fair trial to the accused, of announcing that his mind was already made up in cases to come before him, and of casting "highly indecent and extrajudicial" reflections upon the Government. Chase was found not guilty on most of these charges, though the case had the effect of leading the Democratic-Republican forces to favor a change in the tenure of Federal judges.

4. *Peck's Case*.—In 1830, Judge Peck, of the Federal District Court for Missouri, was tried on articles charging him with unduly punishing an attorney for contempt of court. The attorney had published a criticism of one of the Judge's decisions. Peck was acquitted.

5. *The Humphreys Case*.—At the outbreak of the Civil War, Judge West H. Humphreys, Judge of the Federal District Court for Tennessee, though actively engaged in the rebellion, did not resign. His position was vacated by impeachment. The charges against him were based on a secession speech made by him in Nashville, December 29, 1860, and his acceptance

of the office of Confederate Judge. He was convicted by unanimous vote of the Senate, June 26, 1862.

6. *The Impeachment of President Johnson*, 1868.—The history of this case is well known. It is the only case of impeachment proceedings against a President. The prosecution arose on account of the violent controversies arising on Reconstruction, and was inspired largely by party motives. The charges against the President were based chiefly upon his alleged violations of the Tenure of Office Act.<sup>1</sup> Johnson escaped conviction by one vote. Seven Republican Senators voted against conviction.

## 7. *The Belknap Case*, 1876.<sup>2</sup>

The Senator's term is for six years, and not at the pleasure of the legislature of his State. Originally some thought this too long a term, that the Senators would forget their obligations to their State, and it was urged that a State legislature should have the right to recall a Senator.<sup>3</sup> Sometimes a legislature passes a resolution of instructions directing its Senators how to vote on certain measures, or a resolution of censure, or a resolution requesting a Senator to resign as a misrepresentative of his State; but a Senator is in no way bound to regard such resolutions.

The belief in the right of a State to instruct its Senators, and that the Senators should be bound by these instructions or resign, was formerly quite common. Such was the prevalent idea in the early part of the nineteenth century of the relation of a representative to his constituents. In 1808, John Quincy Adams resigned as Senator from Massachusetts because his vote on the Embargo in support of Jefferson's

<sup>1</sup> See p. 187.

<sup>2</sup> The facts in the Belknap case are set forth on p. 235.

<sup>3</sup> See Elliot's *Debates*, vol. ii., p. 545.

The Belknap Case.

The Six-Year Term: Senators are Not Bound by the Instructions of their States.

State Instruction of Senators.

administration was in opposition to the wishes of his constituents. In 1828, a Senator from Kentucky spoke against the "Tariff of Abominations," but felt himself bound to vote for it "as the organ of the State of Kentucky."<sup>1</sup> In 1836, John Tyler resigned his place in the Senate because the Virginia legislature had instructed him to vote in favor of the Expunging Resolution, which he could not conscientiously do.<sup>2</sup> This theory of the binding force of instructions regards the Senators as ambassadors (and the Representatives merely as delegates) who must look for instructions to the governments from which they are accredited. Early Senators often regarded themselves in this light. Senator Tazewell of Virginia declined President Jackson's offer of a place in his Cabinet, and said: "Having been elected a Senator, I would as soon think of taking a place under George IV., if I were sent as a Minister to his Court, as I would to take a place in the Cabinet." This idea of the Senator's office is now abandoned. No one now expects a Senator to surrender his individual judgment and be moved from the course that he thinks wisest because of his State legislature's censure or instructions. In fact, the Senators, owing to the length of their term, feel less moved by such instructions than members of the House do.

On January 27, 1898, the Legislature of Kentucky asked Senator Lindsay to resign, as he was misrepresenting his party and State on the money question. The Senator, of course, refused. He said:

"I do not exercise my senatorial duties subject to legislative supervision, nor hold my place at the legislative will. I represent, not a party merely, but the people of Kentucky. My term of service is fixed by the Constitution of the United States. It cannot be abridged by the action of the Kentucky

<sup>1</sup> Benton's *Thirty Years*, vol. i., p. 95, cited by Foster on the Constitution.

<sup>2</sup> Foster on the Constitution, vol. i., p. 496.

legislature. Resolutions of legislatures can not relieve a Senator of his responsibilities. His own judgment and conscience must guide his conduct. I am a Senator of the United States. Public questions affecting the interest of the whole country must be considered from the standpoint of broadest patriotism, not merely from consideration of local favor. If a Senator so acting is to be driven from his place by his State legislature, the dignity and independence of the Senate will soon be things of the past."<sup>1</sup>

Of course, public sentiment in a Senator's State will always be a powerful factor in determining his course, as it should be; but the Senator must be free to resist this sentiment when he feels that the public are wrong and he is right.<sup>2</sup>

Usually the small States retain their Senators in consecutive service longer than the large States. The famous Senators in our history have been those of long service, —Senators Benton of Missouri, Bayard of Delaware, Sumner and Webster of Massachusetts, Seward of New York, Morrill and Edmunds of Vermont, and Sherman of Ohio are illustrations in point.<sup>3</sup>

The following reasons have been given by Mr. Bryce why the American Senate has proven so successful and honorable a body:

Mr. Bryce on  
the Success of  
the American  
Senate.

1. *It is representative.*—Most upper houses in European legislatures are hereditary. Our Senate is elective and popular; that is, it can speak with the authority of the people and claim to represent the people, as well as the lower House.

2. *It is convenient in size.*—A small body educates its members better than a large one. Each member has more to do, can more easily master the business of the

<sup>1</sup> *Senate Record*, Feb. 4, 1898.

<sup>2</sup> On instructions to Senators and Representatives see *North American Review*, vol. iv., p. 223; Palfrey, *Niles Register*, vol. xxviii., pp. 193, 200, 216; Foster on the Constitution, vol. i., p. 495.

body, and is given a livelier sense of the significance of his own action in bringing about collective action. A small body can act together better and more surely than a large one, and its members are apt to have more of the spirit of the body. Its members are more apt to stand together against the other house. For this reason the Senate can generally defeat the House in conference on matters on which they disagree.

3. *The permanence of the Senate and the length of term.*—The Senator learns his work and is relieved of biennial anxiety for re-election.

It is the smallness and permanence of the Senate, more than anything else, that have contributed to the superior intellectual quality of its members.

“The true explanation of its capacity is to be found in the superior attraction which it has for the ablest and most ambitious men. A Senator has more power than a member of the House, more dignity, a longer term of service, a more independent position. Hence every Federal politician aims at a Senatorship, and looks on the place of Representative as a stepping-stone to what may fairly be called an upper House, because it is the House to which Representatives seek to mount.”<sup>1</sup>

4. *It is not subject to rapid fluctuations of opinion.*—This is because of its permanence and the longer terms of the Senators.

The Senate thus forms a stable bulwark against popular agitations. The majority of the Senators always have four years more to serve. Within that time public feeling may change. The Senate is less influenced than the House by a fleeting popular sentiment and appreciates more highly the importance of continuity in policy. “The Senate has therefore usually kept its head better than the House. It has expressed more adequately the

<sup>1</sup> Bryce, vol. i., p. 116.



judgment as contrasted with the emotion of the nation. In this sense it does constitute a check and balance in the Federal Government."

Of the three great functions which the Fathers of the Constitution meant it to perform, the first, that of securing the rights of the smaller States, is no longer important; while the second, that of advising or controlling the Executive in appointments as well as in treaties, has given rise to evils almost commensurate with its benefits. But the third duty is still discharged, for "the propensity of a single and numerous assembly to yield to the impulse of sudden and violent passions" is frequently, though not invariably, restrained.<sup>1</sup>

The Senate has been criticised as a "millionaire's club," because it contains so many men of very great wealth. Mr. Bryce says:

"Some, an increasing number, are Senators because they are rich; a few are rich because they are Senators; while in the remaining cases the same talents which have won success in law or commerce have brought their possessor to the top in politics also. The great majority are or have been lawyers. Some regularly practise before the Supreme Court. Complaints are occasionally levelled against the aristocratic tendencies which wealth is supposed to have bred, and sarcastic references are made to the sumptuous residences which Senators have built on the new avenues at Washington. While admitting that there is more sympathy for the capitalist class among the rich men than there would be in a Senate of poor men, I must add that the Senate is far from being a class body like the upper Houses of England or Prussia or Spain or Denmark. It is substantially representative, by its composition as well as by its legal delegation, of all parts of American society; it is far too dependent, and far too sensible that it is dependent, upon public opinion, to dream of legislating in the interest of the rich." <sup>2</sup>

<sup>1</sup> Bryce, vol. i., p. 123.

<sup>2</sup> Bryce, vol. i., pp. 119-120.

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## CHAPTER V

### THE HOUSE OF REPRESENTATIVES

CONGRESS, or the National Legislature, as we have seen, consists of two Houses, the Senate and the House of Representatives. The Senate represents the States, the House represents the nation on the basis of population. This is the basic distinction between the two bodies. Hence, the House is called the popular branch of Congress.<sup>1</sup>

The members of the House, or the Representatives, are chosen every second year by the people of the several States.

Those may vote for Representatives who are qualified by their State laws to vote for the most numerous branch of their State legislature. Thus, the qualifications for voters who elect the members of the National House are fixed by the laws of the respective States. The suffrage is more restricted in some States than in others, but generally the States provide for manhood suffrage. However, they are left free to do as they please in the matter, except that no State, according to the Fifteenth Amendment, may deny the

Who may  
Vote for Re-  
presentatives?

<sup>1</sup> The members of the House are called Representatives, or Congressmen; the members of the Senate are called Senators. The word "Congress" is sometimes applied merely to the lower House, as, "Mr. A. B. is a candidate for Congress." Though the Senate is a branch of Congress it is never designated by any other term than Senate, nor its members by any other term than Senators. But, constitutionally speaking, when it is said that *Congress* has certain powers, both Houses are included.

right of suffrage on account of race, color, or previous condition of servitude. It is also provided, by the Fourteenth Amendment, that if the right to vote for President or Representatives is denied to any of the male inhabitants of a State, being twenty-one years of age and citizens of the United States, except for rebellion or crime, the basis of representation in that State shall be reduced in the proportion to the number to whom suffrage is denied.<sup>1</sup>

In order to be a Representative a person is required: (1) to be twenty-five years old, (2) to have been seven years a citizen of the United States, and (3) to be, when elected, an inhabitant of that State in which he shall be chosen. <sup>Qualifications of Representatives.</sup> It does not follow that any one who can be elected possessing these three qualifications must be seated by the House. A criminal anarchist, a leper, an insane person, would, obviously, be ineligible to take the oath of membership. The House has repeatedly asserted its right to exclude members-elect for treason or other infamous crime. In 1862, Congress imposed a test oath which disqualified thousands of American citizens, and this law remained in force for twenty years. Congress may impose disqualifications for reasons that appeal to the common judgment of mankind. It was on this principle of construction that Congress excluded Brigham H. Roberts, of Utah, as "a notorious, defiant, demoralizing, and audacious violator of State and Federal law relating to polygamy and its attendant crimes."<sup>2</sup>

<sup>1</sup> See p. 351.

<sup>2</sup> See Report of House Committee, January 20, 1900, in the Roberts case, 56th Congress, 1st Session, Report 85, Part I. When the clerk is proceeding to organize a House by administering the oath of office to the members-elect, if the first person offering himself should be objected to as a person unfit to take the oath, the House will consider itself as already organized for the purpose of determining whether such person shall be allowed to be sworn in, and all who hold certificates of election may vote on the question.

Representatives and direct taxes are apportioned among the various States according to their respective

Apportion-  
ment of Re-  
presentatives.  
Size of the  
House.

numbers.<sup>1</sup> This was in keeping with the idea that taxation and representation should go together. Therefore, after every decennial census, Congress allots to each State so many

members of the House. The State determines the districts within its own area for which the members shall be chosen. Formerly the States provided for popular elections in their own way. Some elected their members of Congress on a common ticket by the State at large, as we now elect the Presidential electors. On this plan, usually, the party that carried the State got all the Congressmen from that State, while the other party got none, though the State may have been very close politically. But, in 1842, a national law required that the Representatives should be elected by districts composed of contiguous territory. This law was the outcome of a notable

The Organiza-  
tion of the  
House. The  
New Jersey  
Case, 1839.

contest in the House in 1839, which came up from the State of New Jersey, whose Congressmen were then all elected on a common ticket. The question that arose was whether

the Speaker should be elected before the settlement of the contested election cases from New Jersey; and, if so, whether the members whose seats were contested should have a right to participate in the election of the Speaker and the organization of the House. Every person holding a certificate, whose name is on the Clerk's roll (where it belongs by operation of law), is entitled to participate in the organization of the House, whether sworn in or not. The five Whig members from New Jersey who held certificates of election had their seats contested by their five Democratic opponents, and the Clerk of the preceding House, a Democrat, whose place it was to

<sup>1</sup> Note the exception just cited by the provision of the Fourteenth Amendment, p. 247.

make up the roll of the new House, refused to place the names of the five Whigs on the list of those entitled to vote for Speaker. Without the New Jersey members there were in the House 119 Democrats and 118 Whigs. The Clerk did not presume to put the names of the contesting Democrats on the roll; but the omission of the Whig names would enable the Democrats to elect their Speaker, organize the House, secure a majority of the Committee on Credentials (the Judiciary Committee), and decide the contested seats in their own favor. When, in calling the roll of those entitled to vote in the organization of the House, the Clerk came to the State of New Jersey, he stated that on account of the contest from that State it would be passed until the House could properly decide who were entitled to sit from that State. This created tumult and disorder. The Clerk refused to put motions to the House. After four days of wrangling, John Quincy Adams, addressing the members as "fellow-citizens," appealed to them to discharge their solemn duty of organizing by proceeding with the roll, and in so doing they should call the members from New Jersey who held the certificates of election. "But who will put the question?" some one asked. "I will put the question myself," replied the "Old Man Eloquent." The Clerk was cried down; Adams was elected to the chair, and, under his control, the House proceeded with debate. On December 14, 1839, the House consented to vote for Speaker, refusing both delegations from New Jersey the right to participate in its organization. This was what the Democrats had contended for, but a group of Independent Democrats separated from the body of the party and joined the Whigs in electing Robert M. T. Hunter, an Independent, to the Speakership. The result of this contest was the provision of the district plan for electing the Representatives. It was seen that the district plan of election would generally

District Plan  
of Electing  
Representatives.

prevent a State from sending a solid delegation to Congress, and that it would be a more popular form of election.

In the beginning, the Constitution provided that the Representatives should not exceed one for every thirty thousand of the population. It was thought ✓ unwise to have a large membership. The first allotment of Representatives (made by agreement in the Constitutional Convention before the census of 1790 was taken) provided for 65 members, one for about every 61,000 of the population. One member for every 30,000 of the population would have given a House of 130 members. With the growth of population it has been found necessary to increase the membership of the House, though it is still small in comparison with the lower houses of European legislatures. The present House of Representatives consists of 386 members, and this gives one for every 194,000 of the population. The English House of Commons consists of 670 members,<sup>1</sup> the French Chamber of Deputies of 584, the German Reichstag of 397.<sup>2</sup>

Each State has, of course, at least one Representative, though its population may not be as much as the apportionment would require for the average congressional district. Nevada, with a population of 42,000 has one Congressman, while the average district should have 181,000. Though each State is allotted its share of Representatives, the districts within the States may vary greatly in population, owing to "gerrymandering" acts of the State legislatures.

If after a new Apportionment Act following a census a ✓ State has received an increase in the number of its Representatives and the State legislature fails to redistrict the State before the next congress-

<sup>1</sup> By the Act for the Redistribution of Seats, 1885.

<sup>2</sup> This is one for every 131,000 of the population. The members of the Reichstag are elected by a wide suffrage for a term of five years.



sional election, the new members (or member) for that State are elected by the voters of the whole State on a general ticket and are called "Congressmen-at-Large."

When a seat in the House becomes vacant by the death, resignation, or expulsion of a member, Vacancies in the House. the Governor of the State issues a writ for a new election. A member resigns by letter to the Governor of his State.

Each of the Territories has a delegate in Congress. These may sit and speak in the House and introduce bills and make motions, but they have no right to Territorial Delegates. vote. They are not recognized by the Constitution and are merely persons admitted to the privileges of the House, with the right of explaining and urging matters touching the interests of their Territories.

Congress meets regularly the first Monday in every December. Although a Congressman's term and salary begin on the 4th of March next after his election, the first regular session of the Congress Regular Sessions. does not begin until the following December,—more than a year after the election of the Congress. This first, or long, session may last until July or August, or even until September. The second, or short, session begins in December and must, by the limitation of the Constitution, expire on the following 4th of March. The Congress elected in November, 1902, will not meet until December, 1903, unless the President calls it into "extraordinary session." "Extra sessions" are Extra Sessions. avoided as much as possible; they are expensive and are politically hazardous, and the President is usually reluctant to subject his party to the risks which such a session may bring. It might be better to have the new Congress convene immediately after the Christmas holidays following its election. It would then come fresh from the people, prepared to carry out the policies on which it was chosen. Opposed to this, it has been urged

that the members will not have had time to consider sufficiently the public measures on which they will be called to vote and act. It may be answered that the people ought not to elect to Congress men who have not given worthy consideration to the issues and questions of the day.

The House is organized by the election of its officers, after the Clerk of the preceding House has administered **Officers of the House.** the oath of office to the members-elect. The officers of the House are a Sergeant-at-Arms, a Doorkeeper, a Postmaster, and a Chaplain. The functions of these officers are generally indicated by their respective names.

The *Clerk* becomes politically important and interesting in the organization of a new House. It is his place to **The Clerk of the House.** preside while the new Speaker is being elected. He must act as a fair moderator and give no advantage to either side. In the celebrated contest over the Speakership in 1855-56, when the House was occupied for two months in the attempt to elect a Speaker, the Hon. John W. Forney, Clerk of the preceding House, performed a distinguished public service by the fair and judicial manner in which he presided. His position was a very important and responsible one. The Clerk also makes up the roll of the new House, from the certified returns of the States. He must make up the roll according to the returns. In case of a contest he is not to decide the contest, nor is he free to leave off from the preliminary roll the names of those whose certificates of election are contested. It is the function of the House to settle these contests, and all those who hold the regular certificates of election, whether rightfully or not, are allowed to participate in the organization of the House.

The election of its officers is a mere form in the House. This election is prearranged and predetermined by a caucus of the majority of the House. In this party meet-

ing, held a few days before the time appointed for the organization of the House, and to which only House members of the majority party are admitted, a list of officers is agreed upon. After a majority of the party caucus have agreed upon a list of officers for the House, it is known that these will be elected; for the rule of the caucus is, that those who participate in its proceedings must support its decisions in the open House. It is very seldom that party members refuse to go into a party caucus, and still more seldom that, having gone in, they refuse to support the ticket, or policy, agreed upon by the party majority. Thus the Speaker of the House is chosen, in the first instance, not by the House, but by the caucus of the dominant party in the House, and the choice is only formally ratified by the House as a means of getting the verdict of the caucus incorporated in the official record. Of course, if the majority of the House chose to do so, they could upset the decision of the caucus.

The Party  
Caucus  
Chooses the  
House Officers.

X

The minority leader in the House is chosen in the same way. The minority party determines by a caucus on a choice for the party's complimentary vote for the Speakership. Whoever receives this vote is, by the usage and the traditions of the parties, the acknowledged minority leader. In a session of Congress next preceding a national campaign the minority leader utilizes the energy of his party in the House to "make politics,"—that is, to endeavor, with all the skill and tact he possesses, to put the majority in as unfavorable a light as possible before the country, and the minority in as favorable a light as possible. It is important for the party that this leader be an experienced Congressman and a well-trained parliamentarian.

The Minority  
Leader.

X

The members are seated, the Democrats upon the right of the Speaker, the Republicans upon his left. Individual members are seated by lot. The names of the

members are placed in a box, and there follows a lottery for the choice of seats. A blindfolded page draws, and as each member's name comes out he chooses a <sup>Seat Drawing.</sup> seat not already taken. By courtesy, a few members of very long service in the House are allowed to choose their seats without drawing; or a young member whose name may be drawn among the first may give his chance to choose to an older leader in the House. It is an advantage to have a seat centrally located if one wishes to hear or take part in the proceedings.

The salary of the Congressman, as of the Senator, is \$5000 a year, in addition to mileage,—twenty cents a <sup>The Salary of</sup> mile for travelling to and from Washington,—<sup>Congressmen.</sup> and \$125 for stationery. The English Member of Parliament serves without salary, and if a member of the working classes, or a poor man who cannot afford to serve without pay, should be elected to Parliament he is paid by the collections and the contributions of those who are interested in keeping him in Parliament. In America it is believed that public work should be paid for, and that all classes, rich and poor alike, should be given an equal chance to sit in Congress. America cannot depend upon a wealthy and leisured class to govern.<sup>1</sup>

A Congressman is elected for two years. Occasionally a man of distinction is continued in service for several consecutive terms, and the most distinguished congressional leaders are those who have sat for <sup>The Tenure of</sup> long terms by successive re-elections. But the <sup>the Congress-</sup> local influences in the States, the ambitions and schemes of the political wire-pullers and workers, and the practice of rotation in office that has been considerably cultivated have tended to limit the average length of service to four or six years.

“No habit,” says Mr. Bryce, “could more effectually dis-

<sup>1</sup> Bryce, vol. xi., p. 194.

courage noble ambition or check the growth of a class of accomplished statesmen. There are few walks of life in which experience counts for more than it does in parliamentary politics. It is an education in itself, an education in which the quick-witted western American would make rapid progress were he suffered to remain long enough at Washington. At present he is not suffered, for nearly one half of each successive House consists of new men, while the old members are too much harassed by the trouble of procuring their re-election to have time or motive for the serious study of political problems."

Rotation in  
Congressional  
Terms, and  
its Result.

The State of Maine has lately presented a good example of pre-eminence in congressional influence on account of the practice of her people in retaining for many consecutive terms her able Representatives. Mr. Reed, the Speaker, Mr. Dingley, Chairman of the Committee on Ways and Means, Mr. Boutelle, Chairman of the Committee on Appropriations, and other Representatives from Maine have held places of commanding influence.

By the provisions of the Constitution, Congress shall have power

Powers of  
Congress.

1. To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare of the United States.
2. To borrow money.
3. To regulate commerce with foreign nations and among the several States and with the Indian tribes.
4. To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcy throughout the United States.
5. To coin money, regulate the value thereof, and of foreign coins, and fix the standard of weights and measures.
6. To provide for the punishment of counterfeiting.
7. To establish post-offices and post roads.
8. To promote the progress of science and useful arts, by laws of copyright and patents.

9. To constitute tribunals inferior to the Supreme Court.
10. To define and punish piracies and felonies committed on the high seas, and offences against the law of nations.
11. To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and sea.
12. To raise and support armies. But no appropriation of money for that use shall be for a longer term than two years.
13. To provide and maintain a navy.
14. To make rules for the regulation of the land and naval forces.
15. To provide for calling forth the militia to execute the laws, suppress insurrections, and repel invasions.
16. To provide for organizing, arming, and disciplining the militia, and for governing such part as may be employed in the service of the United States.
17. To govern the District of Columbia,—the seat of government of the United States.

**Powers Denied to Congress.** There are certain powers of government specifically withheld from Congress:

1. No bill of attainder or *ex post facto* law shall be passed.
2. No capitation or other direct tax shall be laid, except in proportion to population.
3. No tax, or duty, shall be laid on articles exported from any State.
4. No preference shall be given by commercial regulations to the ports of one State over those of another; nor shall any inter-State duties be levied.<sup>1</sup>

While the Senate and the House are to be considered as co-ordinate branches of the National Legislature, each has certain exclusive privileges from which the other is barred. The House may not participate with the Senate in confirming appointments or approving treaties. On the other hand, the House has the exclusive right:

**Exclusive Rights and Powers of the House.**

<sup>1</sup> Art. I., Sec. 9.

1. To initiate revenue bills.
2. To prefer articles of impeachment.
3. To elect the President in case the Electoral College fails to elect.

These exclusive powers are not very important and they do not add much to the prestige and power of the House. Since the Senate can amend revenue bills, it can as effectually determine the course of revenue legislation as if it could originate such bills.<sup>1</sup>

Impeachment is but a dormant power in the House. Conviction is so rare and difficult that this weapon of power will never be readily resorted to on the part of the House.

In the eventual election of a President the House becomes of special importance; but in that case the House votes, not as single body, but as a collection of equal and co-ordinate delegations.<sup>2</sup>

There are four methods of division in the House: Voting  
Method of  
Division. X

1. By *viva voce* vote, in which the Speaker determines which side has carried. "It appears that the *ayes* have it," he says.

2. By a standing vote, the members being counted by tellers.

3. By passing between tellers in front of the Speaker's desk.

4. By the yea and nay vote, by which the votes of the members are put upon record. One fifth of the members may call for the yeas and nays, by express provision of the Constitution.<sup>3</sup>

The rules and procedure of the House are too complicated to permit of full explanation here. Indeed, only experienced members of the House ever come thoroughly to understand the application of Rules and  
Procedure.

<sup>1</sup> See p. 211, chapter on the Senate. <sup>2</sup> See p. 118. <sup>3</sup> Art. I., Sec. 4, Cl. 3.  
17

the rules. The parliamentary manœuvres and processes are confusing and are to be learned only by attendance or from a study of the record. Some of the more important phases of the House rules and procedure and the methods of filibustering may be best explained in connection with an historic illustration.

On March 25, 1892, the friends of the Bland Free Silver Bill, after three days' consideration of that measure before the House, wished to bring the measure to a vote. The Committee on Rules had reported in favor of a *special order* for its consideration. A *special order* is an order of the House naming a special time for the consideration of a measure. This is the way an important measure is reached when there are a thousand insignificant ones ahead of it on the calendar. Any piece of business is advanced in the House in two ways: It is made privileged business by giving its committee the right to report at any time<sup>1</sup>; or a special order is passed in its favor setting a time for its consideration. The special order is used as a means of satisfying the political demand or party policy of the hour. Formerly it might be moved, at certain times, by any member of the House, or on a report of any committee. But recently the tendency has been to concentrate the power of the House in a few hands, in order to restrain the power of the minority and to expedite or control the business of the House. This has resulted in increasing the power of the Committee on Rules until this committee, so far as directing and controlling the business of the House is concerned, is now easily the primate among the committees. This committee consists of five members of the House, three from the majority and two from the minority, and the Speaker is chairman of the committee. It became a select committee in 1858 and a standing committee in

Illustration of  
the House  
Proceedings.

The Special  
Order.

Committee  
on Rules.

<sup>1</sup> See p. 287 *et seq.*



1880. Its three majority members are old and experienced members of Congress and the responsible leaders of their party. The powers the committee now possesses enable it to select the business for the House to attend to; all special orders must go to and come back from this committee; it has the right to sit at any time during the sessions of the House; it can report a special order on its own account which has not been previously committed to it, as a resolution from an individual or another committee might be; it is a privileged or licensed committee,—that is, its reports of new and special rules are in order at any time the committee may wish to bring one in; while the Speaker, as a member of this committee, may decide that any filibustering against a proposed rule is out of order as interfering with the constitutional right of the House to adopt rules for its proceedings. While the special order is made by the vote of the House, it can now occur only on the initiative of the Committee on Rules,—a rule which practically makes this committee the arbiter of the business of the House, as in this way it may “steer,” or manage, the House proceedings. If it sees a measure about to pass which it opposes it may block proceedings by a special order in favor of other business; or, if in sympathy with filibustering, it may refuse to report a rule to prevent. Thus the Committee on Rules decides what the House shall do.

The Speaker and the two majority members of this committee may accept or reject a bill, may permit or limit or refuse debate, may admit or refuse to admit an amendment. A member, having introduced a bill, having secured consideration of it and a favorable report by a committee, must get his bill from the calendar, where it is consigned when reported by the committee. To do this he must get the Speaker's consent, or that of the Committee on Rules. This committee decides what the House shall consider. This practice under the rules of the

House practically bars the great body of the majority from any active participation in legislation. They are converted into "brute votes," to ratify what the few leaders determine upon.

"Absolute power over the presentation, discussion, and amendment of measures has been given to the Speaker and the Committee on Rules; and this coterie of less than a half a dozen men entirely dominates all proceedings in the House of Representatives. It decides what shall be considered, for how long, and by whom, and the precise force of any measure is determined in advance."<sup>1</sup>

It is because of the excessive power of the Committee on Rules and of its chairman, the Speaker, that the House has "ceased to be a deliberative body." At times party members have become "insurgents," and have broken away from the control of these leaders who direct the business of the House. This power has been given to the leaders by the vote of the majority and they can undo it by changing their rules. The defence for thus destroying their own importance is that, without rules that vest power with some directing committee, so large a body as the House would be unable to do business. With the open rules of the Senate the minority could prevent any proposal of the majority. A reform lately proposed is that the Committee on Rules should be enlarged and that it should be selected, not by the Speaker, but by the party caucus. It would then be more of a representative committee, and would respond to the judgment of the majority of the House, and "if the majority is not fit to determine its own policies, popular government is a failure."<sup>2</sup>

<sup>1</sup>Quoted from a San Francisco paper by Bell of Colorado, House, March 31, 1902.

<sup>2</sup>Representative Crumpacker of Indiana, Indianapolis *News* interview April 21, 1902. See "The Rules of the House," by Hon. John M.

To resume our illustration: the Committee on Rules had set aside three days for the consideration of the Silver Bill, and the bill was debated until five o'clock of the last day. Among the hostile efforts designed to defeat the bill, Mr. Burrows of Michigan moved to lay the bill on the table, a motion which, if carried, would have disposed of the bill finally. To lay upon the table without naming a day for further consideration is to postpone indefinitely,—that is, *to kill*. The vote upon Mr. Burrows's motion stood 148 to 147. Thereupon, Speaker Crisp voted as a Representative from the State of Georgia, and the vote became a tie, 148 to 148. The <sup>The Speaker's</sup> Speaker has the right of a Representative and <sup>Vote.</sup> may vote at any time, but, having voted once, he may not, of course, vote again. He may break a tie and carry a motion, or make a tie and defeat a motion. Consequently, the Silver Bill was not laid on the table, since it requires a majority to carry a motion. The friends of the bill were striving to keep it in its place as the first matter of business before the House, and they now wished to push it to a vote. To prevent a vote the opponents of the bill began to filibuster. *Filibustering* is the process of resorting to parliamentary tactics <sup>Filibustering.</sup> for the purpose of delaying, or obstructing, or preventing, the business before the House. <sup>in House</sup> The process consists in moving to adjourn, moving to "adjourn till eight o'clock," moving to "take a recess," or that "when the House adjourns it adjourn" to a certain hour, calling for the yeas and nays, and making other dilatory motions which are in order by the rules of the House. A dilatory motion identical with one just disposed of may not be

Thurston, in *New York Independent*, April 24, 1902; speech of Hon. F. W. Cushman of Washington, in the House, April 17, 1902; remarks of Hon. J. C. Bell of Colorado, in the House, March 31, 1902; speech of Hon. J. M. Robinson of Indiana, in the House, Dec. 13, 1899, and March 3, 1898, and in the *Washington Post*, May 5, 1902.

made until some business has intervened; but it will be seen that the motions need be only slightly varied, while a speech (and windy obstructionists are fertile in speeches) has been interpreted as intervening business. It is well understood that motions of this kind can be made without limit, and no bill can possibly pass as long as these motions are kept up. If the minority be large enough these filibustering tactics will always succeed in forcing adjournment or a compromise.

Filibustering tactics against the Bland Bill were kept up until a late hour on the last day for the consideration of the bill, with the purpose of wearying the friends of the measure into a willingness to adjourn. The friends of the bill were determined to continue in session in order to prevent a lapse of the legislative day. A

**The Legislative Day.**

*legislative day* lasts as long as the House remains in session, though it may be a week by the calendar; and thus the contest becomes one of physical endurance. To adjourn without voting on the bill would have been disastrous to it; because, in that case, since only three days had been assigned for its consideration, it would have fallen back to its place on the calendar.

**The Calendar "the Cemetery of Legislative Hopes."**

To get at a bill which is on the calendar the House has either (1) to await the bill's turn in its order, or (2) to advance it on the calendar by a special order,—to set a special time for its consideration. There was no hope of reaching the Silver Bill during that Congress by awaiting its order on the calendar. The calendar is like a great graveyard of ten thousand buried bills. Generally, only the favored ones are called out by the special order. To advance the Silver Bill again by special order would require its friends (as they had done before) to secure a majority of the Democratic members of the House to a petition asking the Committee on Rules to report the order in its favor. Pressing business may have been mapped out which made

this impossible. Or hostile members who wished to make a *record* of favoring the bill, but who were really opposing it, would have refused to co-operate in this private party effort. The *speech* and *vote* of these members were on record in favor of the measure and these could be shown to their constituents, though their private influence, secured through pressure, patronage, or bribery, was against the measure. At this juncture in the conflict over the Silver Bill the Committee on Rules, or its majority, consisting of the Speaker and his two party colleagues on the committee, could have secured the passage of the bill by reporting a *cloture rule* to prevent further filibustering. One of the important powers of the Committee on Rules is that it may, when it wishes, shut off filibustering by reporting a new rule designed to bring the House to a vote. In 1890, a rule empowered the Speaker to refuse to put any motion which he considered dilatory. This promotes "one-man power," and the Speaker vested with such power might disregard the rights of the minority. While this rule is not a standing one it may be made a special one at any time and is apt to be introduced to rebuke and defeat palpable and offensive filibustering tactics. This is the process of cloture, a process by which the Speaker may defeat filibustering and suppress the minority. It is the process by which the House, setting aside parliamentary usage and delays, concentrates its authority in its presiding officer and instructs him to bring it to a decision. However, no member who wishes to discuss a measure in a *bona fide* and serious way is ever apt to be estopped by the forced application of the previous question under a special rule for cloture. A *cloture rule* is a rule or resolution which provides that after a certain limited time for debate all motions and business are out of order except the previous question and the vote on the pending bill, and the Speaker is instructed to recognize no member for

Cloture.

in House

x

the purpose of making a dilatory motion, and to declare all such motions out of order.

The *previous question* is the most common form of cloture. It is the chief parliamentary remedy against filibustering. If members are indulging in ob-  
X **The Previous Question.** structive debate merely to stave off or prevent business the previous question may be moved, and if this carries, the House must then vote upon the question before it. No debate is allowed on the motion for the previous question. The motion for the previous question is a motion for the closure of debate. It cannot be applied in the Committee of the Whole, but it may be decided there to adopt it as a rule for application in the House. On the occasion of the struggle over the Silver Bill to which we have referred the Committee on Rules refused to report a cloture rule and the Silver Bill was laid on the shelf by the filibustering tactics of its opponents.

When a bill or a proposition for a law is offered for enactment it is, if a public bill, handed to the Speaker, and  
A **How a Bill is Passed.** *in* if a private one, to the Clerk, and by him it is sent to one of the fifty or more committees which are appointed at the beginning of the Congress. In committee, from eleven to fifteen men examine it, and, if necessary, give hearings to members and citizens who wish to present arguments or facts to guide the committee to its conclusions. The committee then reports, and if the bill requires money from the Treasury, or property of the United States, its name goes on a list called a calendar of the "Committee of the Whole House on the State of the Union." If the bill does not carry money its name goes on the House calendar.

Every morning, when the House does not otherwise  
m.d. **The Morning Hour.** order, there is a period of time called the *morn- ing hour*—which may be an hour or a day—when bills which do not carry money can be called up

and passed. It is harder to get at money bills and harder to pass them, especially if there be opposition.

“ In the Committee of the Whole House on the State of the Union, there is general debate, so hard to close, and five minutes’ debate, so provocative of other five minutes. The Committee of the Whole is a very asylum of oratory, economy, and patriotism. There the workingman gets exuberant justice done him, especially during election year. There tyranny receives its most dreadful buffetings, and trusts and monopolies are properly and accurately characterized.”<sup>1</sup>

Long sessions—continuous night sessions—are often held in order to force agreement from the House.

“ What men will not yield to conviction they will yield to weariness. After sitting up all night principles do not seem so utterly supreme. Constitutional views of the patriot will give way under prolonged weariness of the flesh. What Congress would not vote in the evening it may be ready to vote by five the next morning, if kept in session. If you must have agreement it is just as necessary to lock up Congress as it is to lock up a jury. Men are such queer compounds that nothing but physical discomfort will reveal to set obstinacy that half the questions of principles are questions of temper and half the other half mere pride of opinion.”<sup>1</sup>

In the English Commons, bills are generally carried through by the Government, and the party majority are brought into line for the support of all Government bills. A *Government bill* in England is one brought in by the responsible Ministry of the day; that is, a bill originated and supported by the Cabinet, or Government. Having behind it the responsibility of the Ministry it will have the support

A “ Government Bill ” in England.

<sup>1</sup> Hon. Thomas B. Reed, in *The Youth's Companion*, Dec. 4, 1890.

of the majority which keeps the Ministry in office. All important bills involving political issues are Government bills, and as the Ministry disposes of half the working time of the House it has facilities for pushing its bills. A Government bill is carefully weighed and discussed by the Cabinet before it is introduced. The Government must stand or fall with the bill; if it is rejected they resign. Such a bill is exposed to the hostile criticism of the opposition, who seek to discredit and defeat it. A private member—that is, a member of the House but not a member of the Ministry—may introduce a bill on his own account and urge its passage. But the Ministry is held responsible for what the House does. If they allow a private member to pass a bad bill, or prevent his passing a good one, they are blamed. Consequently the Ministry will be called upon to state through one of its members whether the Government opposes or favors the bill, or is neutral. The attitude of the Ministry may determine the fate of the bill.

There are no Government bills in Congress. All members are private members. The nearest approach to a Government bill is one presented by some leader of the majority at the behest of his party caucus, or as the spokesman of the Administration. Sometimes members of Congress, by interviews with the President or by means of official influence, are brought around to favor a bill that they have previously opposed.

Breaking a quorum by refusing to vote was formerly one of the favorite and most effective means of filibustering in the House. In order to prevent this Speaker Reed, in 1890, announced a notable decision touching the quorum, that gave rise to one of the most heated parliamentary conflicts in the history of Congress.

The Constitution says: "A majority of each house

A "Caucus  
Bill" in  
America.

The Struggle  
over the  
Quorum



shall constitute a quorum to do business; but a smaller number may adjourn from day to day and may be authorized to compel the attendance of absent members, in such manner and under such penalties as each house may provide.” A Constitutional Quorum.

For one hundred years, from 1789 to 1890, it was the custom and rule of the House to determine a quorum—that is, to ascertain whether there were enough members present to do business—by roll-call. “Raising the Question of a Quorum.” X

Any member, after the House had voted upon a bill, might raise the question of a quorum, and if from the Clerk’s record it should appear that only a minority of the House had answered to the call, or had voted on the measure, the Speaker was bound to announce that no quorum was present and that the measure had failed from lack of a quorum. It is true that many times the House proceeds in the transaction of business without a quorum. Many measures, and very important measures too, are often passed while only a handful of members are present in the House. But this is because no one objects to what is being done, and, according to a legislative fiction, the House is supposed not to know that there is no quorum present. No one has called the attention of the House to that fact. But any member may do so at any time by saying, for instance, “Mr. Speaker, I raise the question of a quorum.” He may do this for the purpose of calling the attention of the House and the country to the merits of the proposed legislation; for then, if the member persists in his objection and insists upon the presence of the quorum, a majority of the members must be present, and their presence is determined, not by their being seen, but by their answering to a roll-call. Under the old rule, if a quorum is demanded, a majority of the whole House *must vote on a pending measure* before it can be passed. In this way a conscientious and vigilant member, “a watchdog of the treasury,” may prevent many bad jobs from

going through while a great majority of the members are absent or indifferent. But a member may also thus obstruct innocent and necessary legislation and make himself merely annoying to his fellow members. And it will be seen that by this rule of determining the quorum (not by the actual presence of members, but by their voting) a minority party, by persistently refusing to vote, may prevent the transaction of business which they do not like. For when the parties are closely divided in the House it is next to impossible for the majority party to have a quorum on hands. *All* their members

cannot be there at once; some will be indifferent to the public, or the party, business; some may be at home attending to their "political fences"; some will be sick, or by a sick-bed at home, and some will be otherwise unavoidably detained. The old rule was designed to enable the minority party to compel the majority party to be on hand to vote measures through. If the party majority are to constitute the House to do business a large minority party may at any time "break the quorum" by refusing to vote, and thus block the party measures of the majority. Although it might be perfectly clear that a quorum was present the House could take notice only of those voting, and nothing could be done but to proceed with business to which the minority party will give their consent.

Speaker Reed's decision in 1890 consisted in directing the Clerk to add to the list of those who had answered the roll-call the names of members as "present but not voting" whom he saw in the House. Thus the Speaker *made* a quorum by adding enough of those whom he saw to those whom the Clerk heard. *A majority present doing business by voting* was the definition of a quorum by the old rule. *A majority present shall constitute a quorum to do business* was the new interpretation, and the pres-

Breaking the  
Quorum a  
Means of  
Filibustering.

ence of the majority may be determined by the counting of the Speaker.

In defence of the old rule it may be said that a measure should have a majority of the House in its favor; if the majority wishes to pass a measure they should be there to pass it; that it is the right and duty of the minority to require for the passage of a law to which they are opposed that a clear majority of the whole House should be registered in its favor. An unscrupulous Speaker may see only one side and may name as present for partisan purposes members who are not present.

Defence of the  
Old Rule of  
the Quorum.

Y

But, on the other hand, if members may not be allowed to break the quorum by their absence it is hardly reasonable to expect that they should be allowed to do so by their silence after they have been compelled to come in. The House is perfectly free to adopt whatever constitutional rule it pleases for the determination of a quorum, and if it had adopted the rule of 1890 in the beginning, it is not probable that any objection would have been made.

The Supreme Court, in a case brought to test the constitutionality of a law passed under this ruling, held that it is within the competency of the legislature to enact any rule not forbidden by the Constitution, or that is not against natural justice, in order to secure the presence of a quorum; and "when the quorum is present it is there for the purpose of doing business." The Court held, in substance, that a man's legal presence was his bodily presence, not the presence of his judgment as manifested by his voice; and that if a man is present in the body he is properly supposed to have his voice and his judgment with him.

The Supreme  
Court Sustains  
Legislation  
under the  
New Rule.

Y  
of quorum

Speaker Reed's decision was made before the Fifty-first Congress had adopted its rules, and it was said in criticism of the Speaker that while the *House* had a right to

adopt such a rule, the Speaker had not. But Mr. Reed was acting in accordance with the instruction of his party majority as expressed in the party caucus, and the House afterwards adopted the rule in accordance with his decision. The minority would have filibustered against the adoption of such a rule and the quorum decision would have been necessary, probably, in order to carry the rule itself, though it is true that the regular parliamentary order would have been to adopt the rules first and to come to the decision as to the quorum afterwards. It may fairly be concluded that this notable parliamentary decision, while not violating the law of the Constitution, and while giving ample rights and privileges to the minority, has made it easier for the majority to govern: it will tend to restrain partisan filibustering and bring despatch to the business of the House.

It will be seen from what has been said that the Speaker is the most important officer of the House. In fact, he is the most interesting and important  
**The Speaker.** legislative officer in the American Commonwealth, if not in the world. In no other free legislative body in the world is there an officer vested with such vast legislative power as has the American Speaker. Mr. Bryce says that our Speaker holds "a power which in the hands of a capable and ambitious man becomes so far-reaching that it is no exaggeration to call him the second, if not the first, political figure in the United States."

The Speakership was an office well known in England when our Constitution was formed. The Speaker of the Commons was the spokesman of the House when the Commons addressed the king. Following the example of the English title the presiding officer of the legislative assemblies of the Colonies was called *Speaker*.

In comparing the English and the American Speaker, we see the difference between a Speaker as a mere moderator, a fair and judicial presiding officer of the House,

and the Speaker as a political and party leader, the representative head of his party and the director of his party's policy. In England the Speaker is not a party leader ; he is a mere parliamentary presiding officer, like our Vice-President in the Senate. The English  
and the  
American  
Speaker  
Compared.

It is said that after his election, after he passes from the benches to the Speaker's chair, he forgets to what party he belongs ; his purpose is to hold even, fair-handed justice between the two sides of the House. Generally the same Speaker continues in service, no matter which party carries the House. "In 1841, when there was a decided Tory majority in the House, the Prime Minister, Sir Robert Peel, supported 'with great satisfaction' the former Whig Speaker. Mr. Bryce tells us that Mr. Brand, although he had once been Whip of the Liberal party, was re-elected Speaker in 1874 by the Tories, who had then gained a majority, and served on until 1883 ; in 1895, Mr. Gully, a staunch Liberal, was re-elected by Conservatives, receiving a unanimous vote. Yet when a vacancy occurs, either by death or resignation, the party in the majority appoints one of its own members. The chief requirements for the office are strict impartiality and a thorough knowledge of, and an experience with, the rules and precedents of the House. Firmness, sound judgment, tact, temper, and courtesy, a clear mind and an upright character are, of course, important considerations." <sup>1</sup>

The same good qualities are required in an American Speaker, but as to his party relations the case is different. The American Speaker is a party leader. He is expected to use his office for party purposes. The power of the American Speaker arises from three sources : Sources of the  
Speaker's  
Power.

1. His power of appointing the committees.

<sup>1</sup> Follett's *The Speaker*, p. 30.

2. His power of recognition, by which he assigns a member the floor to address the House or make a motion.

3. His position as chairman of the Committee on Rules.<sup>1</sup>

We may include under the Speaker's power of appointment his power to appoint the chairman of the Committee of the Whole House and his power to appoint a Speaker *pro tem.*, for a period not to exceed ten days,—in addition to his appointment of the regular committees. As the committees have almost absolute power over legislation it will be seen that this power of appointment gives the Speaker tremendous influence over legislation. No other officer in the Government has such legislative power. "Legislation rests with the committees; they may initiate what they please; they may stifle any measures which have not their approval; the rule that no bill shall be discussed without being reported by a committee might almost as well read, without being approved by a committee."<sup>2</sup> This power of appointing the committees comes to the Speaker not by the Constitution, but merely by the rules of the House. He has also the power of appointing the chairmen of all of the committees. This came from the custom that has grown up of considering the first named on the committee as its presiding officer.

The Speaker seeks to make up the committees to suit his own views and to promote his party policy. If the Speaker is opposed to legislation on a certain subject he can make up such a committee on that subject as will effectually bury in committee all proposals of legislation on that line. If he favors legislation on another line he can appoint a committee favorable to his view. Of course, the Speaker is influenced, if not bound, by sectional and party influences, and perhaps by his personal

<sup>1</sup> For the explanation of this factor in the Speaker's power, see pp. 258 *et seq.*

<sup>2</sup> Follett, p. 243.

obligations, in determining the composition of his committees.

Speakers have been accused of bargaining with members before their appointment to important chairmanships.

“The Speaker has an opportunity to help his party in determining the relative strength of the two parties on a committee; he can put the strong men of the minority on the committees that have little influence, and the weak men of the minority on the powerful committees. To act thus would be unfair, of course. If the minority is to be given any place on an important committee it is only just that it should be represented by its able men. Still there are many shades of fairness and unfairness. Probably no Speaker now ever so organizes the committees as to secure to the minority their full proportionate influence. The Speakers who come near to it are called fair; those who do not are called unfair and partisan.”<sup>1</sup>

It has been proposed several times that the committees should be appointed by the House instead of by the Speaker; and that the minority members and the extent of their representation on the various committees should be determined by the minority itself. The result of this would be that the appointments would then be made by the caucuses of the two parties. This would cause “log-rolling,” loss of time, and deadlocks.

By the Speaker’s power of recognition he may recognize a member who addresses the Chair and assign him the floor, with the privilege of making a motion or addressing the House. Originally, it was expected, and was the rule, that the Speaker should recognize the member who was the first to speak; but in practice it has come to pass that the Speaker uses this ordinary parliamentary duty for political and party purposes, and recognizes only such

2. The  
Speaker’s  
Power of  
Recognition.

<sup>1</sup> Follett’s *The Speaker*, p. 230.

persons as he pleases. When a member rises and addresses the Speaker he may be asked, "For what purpose?" and if the purpose be satisfactory to the Speaker the member may be recognized and allowed to have the floor. Usually it is prearranged with the Speaker that the floor is to be assigned to members in a certain order.<sup>1</sup>

As a rule, the Speaker is bound by certain usages in recognition. He will recognize a committee in the person of its chairman in preference to an individual member; during the various stages of a bill the member who has the measure in charge is preferred for recognition; a member is usually recognized to present a matter of privilege or a question of order; during a debate the Speaker should give the floor alternately to members of each party; and the Speaker generally uses his power of recognition in conjunction and co-operation with his party chiefs, the chairmen of the important committees.

But while these unwritten usages may limit the power of recognition to an extent, there are times when the power is unlimited, and it may be used in emergencies in such an arbitrary manner as to give the Speaker absolute control of legislation. During Mr. Carlisle's term as Speaker, the Blair Educational Bill, which had passed the Senate three times, was not even allowed to be voted upon by the House. The Speaker was opposed to the bill, and he would therefore not allow any member to move to take it up for consideration, or to fix a day for its consideration. Mr. Blaine, while Speaker, often required measures to be amended to suit his views before he would permit them to come before the House; and

<sup>1</sup> "The extent of the custom is shown by a story told of a lieutenant-governor of a Western State when presiding over his State Senate; he turned to the doorkeeper and said, 'Go out and find Senator Gunson—he is somewhere about the capitol—and tell him that he has been recognized and has the floor.'"—Follett's *The Speaker*, p. 250.



repeatedly the Speakers, by withholding recognition from members, have refused to allow the House to vote upon measures which, it was known, the majority of the House would readily pass if an opportunity offered. In England, if the Speaker of the Commons recognizes a member who, in the probable opinion of the House, was not the first to address him, the majority may overrule the Speaker and decide who shall address the House. In America, the Speaker decides, and he sees or refuses to see, as he thinks the public interest may require or his party interest may dictate. The only check to this power is the sentiment of the House, the moderation among his party majority; that is, the fear that if he go beyond all endurance, if he be not fair to his party associates and (where party interests are not too much at stake) reasonably fair also to his party opponents, the power which elevated him may degrade him. For the Speaker may at any time be removed from his position and another Speaker elected.

It must be understood that in the arbitrary exercise of this power of recognition the Speaker does not act for himself alone. He acts for a cause; or he is the organ of his party majority. He is the organ of the House, it is true; but he is also the organ of his party and the agent of that party to bring things to pass. The House stands for party government, and for the acts of the Speaker the party majority must be held responsible. It is through him they govern. The power to govern, the power to act or to force action when the House desires, and thus to set aside obstructions and suppress those who would prevent the action of the House,—this power must be lodged centrally somewhere. In England it is in the Cabinet; that is, in the central guiding committee who manage the business of government, all of whom are members of Parliament. In the American House of Representatives this

The Speaker  
is a Party  
Organ.

x

power is in the Speaker, who acts, presumably, with the advice and consent of the Committee on Rules, or of the Steering Committee of his party managers, of which the Speaker is chairman; and, if need be in order to carry out party ends, no one can obtain the floor for any purpose except by the Speaker's consent.<sup>1</sup> To rebuke the Speaker is to rebuke the party, and the question whether there is in his office and in this power of recognition a dangerous *one-man power*, whether one man may be so trusted, is merely the question whether the party majority may be so trusted. The safeguard against an unscrupulous Speaker is the integrity of the party majority; that against an unscrupulous majority, in an independent and vigilant people.<sup>2</sup>

It is not to be understood from this account of the Speaker's power that his power is unlimited. His powers are limited and prescribed:

✓ The Speaker's  
Power is  
Limited.

1. By the Constitution and laws of the United States.
2. By the Rules of the House.
3. By the precedents and practices of previous Speakers.
4. By general parliamentary usage.

It would be a daring Speaker who would attempt to override all these restraints, although some Speakers have been accused of doing so. The House rules, the previous precedents, and parliamentary usage should all be in harmony with the Constitution and the laws, but if, in the judgment of the Speaker, they should be in conflict, he decides by what limitations he will be bound. In

<sup>1</sup> A new member of the House had a bill which he wished to urge. Approaching an old member for support he asked whether he did not think his bill would pass the House. The old member replied that it was more important to consider whether it would pass the Speaker.

<sup>2</sup> For the Speaker's power as chairman of the Committee on Rules, see the account of the *Proceedings* of the House, pp. 258 *et seq.*

1877, when an attempt was made in the House to obstruct by filibustering the declaration of President Hayes's election in accordance with the findings of the Electoral Commission, Mr. Randall used his power as Speaker, and especially his power of recognition, to defeat this filibustering attempt. He declined to entertain points of order, and he even refused to entertain appeals; and although members mounted to the tops of their desks and with menacing arms and loud shouts demanded recognition, the Speaker had neither ears to hear nor eyes to see any but the one who, as he knew, would make the proper motion,—the motion which he wished to have made and passed. In this he did patriotically, and against his party interest, what the majority of the House and of the country desired him to do. But in doing so he overrode the rules of the House and disregarded preceding decisions and all parliamentary usage. He defended his course on the ground that the law of the land took precedence over the other limitations upon him, and that he was bound to act in harmony with the law providing for the Electoral Commission. "To me," he said afterwards, "the law was higher than the rules, when the law came in conflict with the rules."<sup>1</sup>

Speaker Randall Forces Concurrence of the House with the Findings of the Electoral Commission, 1877.

X

While the early Speakers were party men, always elected by a party division, they were not always party leaders. They did not employ the Speakership to direct affairs. The election of Clay, in 1811, marks an epoch in the development of the Speakership. Clay's personal popularity promoted the importance of the office. He was six times elected to the Speakership during a period (1810-22) when the Republican party was coming to the control of the politics of the country without much rivalry or opposition. Clay used the Speakership, not so much for

Early Speakers. Clay the First Party Leader in the Speakership.

<sup>1</sup> Follett, p. 123; *Cong. Record*, 47th Cong., 1st Sess., p. 4308.

party ends, but to give direction to his country's policy. Under Clay, who exercised personal as well as parliamentary power, the Speaker became the legislative leader. Clay's object was, not to moderate the House, but to guide it. He spoke freely upon pending measures, and he generally voted in order to go upon record before the House and the country. In becoming Speaker he forfeited no privilege of the floor. In Committee of the Whole, the Speaker has merely the status of a private member, and there Clay exercised the office of the leader. He performed the combined offices of moderator, member, and leader.

The strength that came to the leadership through Clay's personal power remained to abide in the office.

**Winthrop as Speaker.** Speaker Winthrop (1847-1849) sought, in a measure, to restore the English traditions of the Speakership by acting merely as a fair parliamentary presiding officer, treating friends and foes alike. But he could not do this while retaining and exercising the power of making up the committees. Party forces and interests were too strong to enable a Speaker to use this power and remain neutral. Winthrop's refusal to announce his committee policy touching the slavery question in the Territories was the issue that led to his defeat. Giddings wrote to Greeley in 1849:

"The Speaker exerts more influence over the destiny of the nation than any other member of the Government except the President. He arranges the committees to suit his own views. If a Whig in favor of prosecuting the War be elected Speaker, he will so arrange the committees as to secure reports approving of our conquests in Mexico. If he be opposed to the War he will so arrange them as to have reports in favor of withdrawing our troops."

The power of the Speakership was considerably advanced under Mr. Blaine (1869-1876). He greatly ad-

vanced the power of recognition. It is said that he bargained with men for the privilege of the floor. "If you will make your resolution so and so, I'll see Mr. Blaine as Speaker. that you have the floor,"<sup>1</sup> and many members preferred to introduce bills stamped with Mr. Blaine's interference and approval than to lose their bills altogether. This was an unusual assumption of power, for the Speaker who can frame resolutions and alter bills very nearly controls the House.<sup>2</sup>

"The most abiding difficulty of free government is to get large assemblies to work promptly and smoothly either for legislative or executive purposes."<sup>3</sup>

The Committee System.  
Cabinet and Congressional Government Compared.

Two schemes that have been evolved by political experience for meeting this difficulty should be noticed.

One way to make a large legislative assembly work well is to provide that its majority shall appoint a small group of responsible party leaders and follow them without question, adopting what they adopt, rejecting what they reject. This group of leaders make up the executive government which the nation has chosen to support by electing a House to support it. This Government Committee are members of the House; they are its official governors, and they are responsible for what is done. If they do well and propose good measures, they are to be retained. If they do ill and propose bad measures, they are to be turned out, and another government, or ruling committee, is to be put in. This is the English way,—having a central, ruling committee to control all legislation and government business in the House, whose

<sup>1</sup> *Nation*, vol. xxvi., p. 226, cited by Follett.

<sup>2</sup> Follett, p. 104. For further discussion of this subject the student should consult Miss Follett's valuable work, *The Speaker of the House of Representatives*, 1896.

<sup>3</sup> Bryce, vol. i., p. 155.

leadership the party majority in the Commons are sent up to support.

This enables the House majority to act, by leading the great mass of its members to do what they are told to do and to vote as they are told to vote; and it enables the nation to hold the small group of government leaders responsible for what is done. Members are not expected to act on their own judgment. They must follow their leaders. Mr. Bagehot relates that an experienced member of the Commons once said that he had never but once presumed to exercise his own conscience and judgment in determining how he should vote, and then he soon found out that he had voted wrong. The party system requires the members to adhere to their leader, or appoint another. Otherwise they will be impotent to legislate at all. In this way, if the nation does not like what is done it knows exactly whom to punish. It can turn out the head leader, the premier, who is chairman of the governing committee, and his committee must go with him.

This system concentrates the political leadership and talent in the House in a single committee, the Cabinet, and in the group of leaders on the opposition benches who become the governing committee if the Cabinet be turned out.

The other working plan is to divide the House into a large number of small groups, committing to each group certain questions for final determination or report. The groups are independent of one another, and each pursues the business committed to it in its own way without reference to the work of the other. The full House may then adopt or reject the conclusion of the few men appointed to attend to the particular business in hand. This is the committee system seen in our national House of Representatives.

The committee system in America arose from the political situation existing when the first Congress met. It

arose from natural custom; it was not created or instituted by design. When the first Congress met there were no government ministers present whose business it was to draw up measures and shape the business of the assembly. This had to be done by the House. It was natural that the whole business of the House should be divided among its members. They were all equal in the matter of official responsibility, and it was but fair to divide up the work and to treat all alike.

Origin of the  
Committee  
System.

When the House had little business there were but few committees. At first the House, in Committee of the Whole, would decide upon the leading principles of a measure and then appoint a special committee to report a bill accordingly. As regular business recurred regular committees met the requirements. In 1802, there were but five committees. Gradually, with the growth of the country and the increasing business of the House, this number grew to the present complex system. There are now fifty-five regular standing committees in the House, each a little legislature for the business with which it has to deal. The following classes of committees should be noticed:

1. *The Committee of the Whole*.—This is the whole House sitting as a committee. It is a form of proceeding under which the House is freer, less hampered by rules. The Speaker calls some other member to the chair, there is freedom of debate, the previous question is not applied, though the House in Committee of the Whole may decide to apply it in regular session. In Committee of the Whole the chairman cannot use the Sergeant-at-Arms and the mace to preserve order. The members sometimes take advantage of this to create disturbance, and then the Speaker must be sent for, whose presence restores order.<sup>1</sup>

Committee of  
the Whole.

2. *The Caucus Committee*.—This is a party agency

<sup>1</sup> MacConachie, *The Committee System*, p. 166.

organized for party purposes. It is not properly a committee of the House but of the party, to attend to party business. It is a substitute for the English Whip.<sup>1</sup>

X 3. *Special or Select Committees.*—These are created ~~How~~ <sup>Special</sup> ~~Committee~~ for special purposes, like committees of conference, or they may be committees for unusual purposes and occasions.

✓ 4. *The Standing Committees.*—Some of these are licensed, or privileged committees, and all are appointed ~~How~~ <sup>Standing</sup> ~~Committee~~ anew for every Congress by the Speaker. He appoints the chairman of each by naming him first on the committee.

To one of these standing committees every bill is referred. Generally from the nature of the bill, or proposed measure, it can be determined to what committee it should be referred. But sometimes there is a dispute about this, and there is rivalry among the committees for the control of a bill. On such a dispute the fate of a measure may depend, for of two committees contending for the possession of a bill one may be favorable, the other hostile.

✓ Committee meetings for the consideration of a bill are usually secret. If open hearings are given to the advocates and opponents of a bill, as is sometimes ~~How~~ <sup>Committee</sup> ~~Sessions~~ done, reports of the proceedings are not usually published; and how a member votes on a bill in committee, or what influences are brought to bear there, cannot be known; for what occurs in private sessions the members are pledged not to reveal.

The committee may amend a bill or substitute a new one. The decision of a committee with reference to a measure is practically final, for while the House may overrule the committee, it seldom does. Men who are absorbed in committee work on other measures are disposed to accept the conclusions of those men who have

<sup>1</sup> See p. 299.



been especially appointed for this particular business. They are the men appointed to hear the cause and decide. It is for this reason, it is said, that our legislation is by committees and not by the House. The House merely ratifies the decisions of the committees.

If the committee is unfavorable to a bill it may kill the measure by reporting adversely, or by reporting too late, or by not reporting at all. Most bills are buried in committees, as they ought to be; that is, the bills are never reported back to the House for the action of that body. If a committee is smothering a good bill by neglecting to report upon it, contrary to the sentiment of the House and of the country, the House may order the committee to report, or it may transfer the measure to another committee. These processes of taking a bill from the jurisdiction of a committee are not usual nor easy to apply. Committee leaders will be apt to stand by one another in defence of their prerogative.

The House  
may Control  
its Com-  
mittees.

X

When a committee is ready to report on a measure, for its passage or its rejection, the House can afford but a very short time for the consideration of the report. Aside from specially privileged committees not more than two hours, on an average, can be allowed for a committee report. This is a very important factor in making the action of the committee final in legislation. The House seems almost forced to accept what its committee does. The chairman of the committee has an hour at his disposal, during which he is expected to explain and advocate his measure. He can give but a bare outline of his bill and of his reasons in its defence. He yields the floor to others for brief speeches. Advocates and opponents of the measure, who have been previously agreed upon, speak on the bill. At the close of the allotted time the chairman of the committee moves to accept the report and at the same time he moves the

House  
Consideration  
of a Commit-  
tee Report.

K

previous question. This cuts off further debate and the bill is then hurriedly voted on to get it out of the way of other measures pressing hard for time. Members wishing to speak must arrange with the Speaker and the chairman of the committee having the measure in charge. In considering a committee report the House proceeds on the principle that it is not a deliberative, talking body, but that it is a deciding body, and that on a piece of committee business the committee should have control, and that what the House does should be done through it.

✓ **Advantages of the Committee System.** The advantages of our committee system may be briefly summarized:

*Handwritten: 1. It is a convenient means of killing off worthless bills.*  
1. It is a convenient means of killing off worthless bills. The House should not have its time taken up with all the ten thousand schemes proposed, by request or design, through its various members. It could not, if it would, consider one tenth of these measures. The committees can dispose of them rapidly by taking no further notice of them, and the House protects itself by requiring that a measure shall be considered in committee before it can come up in the House.

2. It enables the House to deal with more bills. Many committees can pursue many lines of investigation. The House, by trusting its committees and accepting their work, can accomplish much more in legislation than it could otherwise do. In this the House takes the risk of accepting without knowledge the bad work of its committees as well as the good.

3. It promotes specialization in legislative work. While it divides the business of the House by separating the able, experienced leaders, the chairmen of committees, into different and independent fields of labor, this may be compensated for by assigning to each leader the work for which he is especially trained and disposed. The chairman of the Committee on Naval Affairs, or on Foreign Affairs, or on Commerce, may have made the subject

of his committee work his life's study; or his experience, training, and disposition may fit him especially for service on this particular line, though often the chairman of a committee has to learn his work after he is appointed to it. The system provides that every subject of legislation may have applied to its consideration whatever of special ability and training and experience the House can command. Senator Dawes on Indian Affairs, Mr. McKinley and Mr. Dingley on the Tariff, and Mr. Holman or Mr. Cannon on Appropriations all became experts in their respective fields of legislation. No single body of men acting as a central committee for all business could be expected to secure so wide and efficient a grasp on all the departments of legislation as these men had over their special work.

4. The committee system affords a plan by which Congress can scrutinize and, if need be, expose the conduct of the executive departments. The committee may investigate any department, call for reports, examine witnesses, and hold to a strict and constant accountability to public opinion the administrative departments. The committee and Congress can control the departments only to the extent of reporting the condition of affairs. This power of the committee may be used to the annoyance of the departments as well as for the enlightenment of public opinion.

5. The committee system offers a suitable means of co-operation between the executive and the legislative departments. It is in the committee that the Administration can properly recommend and urge for passage the public measures that it favors. Cabinet members may not urge their measures on the floor of the House, but they may do so before the committees either in person or in writing. The committees may bring to the House all of the advantage of executive information and advice, and it is in this way, through the intermediary of the

committees, that the legislative and executive departments of the government work in harmony to the same end.

**Disadvantages of the Committee System.** But the American committee system has serious disadvantages. Mr. Bryce and other political observers of our Congress cite the following:

(1) It breaks up the unity of the House; (2) cramps debate; (3) lessens the harmony of legislation; (4) facilitates corruption; (5) reduces responsibility; (6) dissipates the ability of the House into independent groups; and (7) lowers the interest of the nation in the proceedings of Congress.

As legislation is practically shaped in the committees, there is more interest in the proceedings of the committee than in the proceedings of the House. The House proceeds in little independent groups working in many directions at once, practically behind closed doors. The result of this is that, although the public are expected to keep a close watch on their representatives, the people cease to watch when they cannot see how things are done, or who are doing them. There can be no life in a debate in the open House, and but little use for one, when the question for debate has already been settled in the committee. Some set speeches may be made for campaign purposes in the country, but no member can hope to say anything that will have any weight in convincing his colleagues, nor can he in any way hope to instruct the House on the proposed measure. The committee chairman may do something in this direction, but his contribution is an official explanation, not a discussion of the proposed bill.

**Mr. Bryce's Criticism on the American Committee System.** Laws proposed by fifty different groups without common oversight by any one interested in bringing all the laws into an harmonious code are sure to be inconsistent and contradictory. The small size of the committee and the secrecy of its proceedings offer to the "log-roller" and the

"boodler" an excellent opportunity for corruption. The temptation is all the stronger, as wrong-doing in the committee is the more difficult to expose. The votes of a very few men may change the result in committee. The people cannot watch the doings of fifty bodies, and as Congress places the responsibility for wrong-doing upon the committees and the committees can so easily evade it, whom can the people punish? Upon this evasion of responsibility Mr. Bryce says:

"In England if a bad act is passed or a good bill rejected, the blame falls primarily upon the Ministry in power whose command of the majority would have enabled them to defeat it, next upon the party which supported the Ministry; then upon the individual members who are officially recorded to have 'backed' it and voted for it in the House. . . . But in the United States, the Ministry cannot be blamed, for the Cabinet officers do not sit in Congress; the House cannot be blamed, because it has only followed the decision of its committee; the committee may be an obscure body, whose members may be too insignificant to be worth blaming. The chairman is possibly a man of note, but the people have no leisure to watch fifty chairmen; they know Congress and Congress only; they cannot follow the acts of those to whom Congress chooses to delegate its functions."<sup>1</sup>

The vital need of providing unity and responsibility in congressional government is best illustrated by the practical working of the Finance Committees.

*Handwritten:* Finance Committees and their Work. ✓

There is no more important subject with which a government deals than the raising and disbursement of revenue. "The revenues of a State are the State," says Burke. If the people cannot control their own revenues, if they cannot discharge and punish their public servants for misconduct in raising and spending public money,

<sup>1</sup> Bryce, vol. i., p. 161.

republican government fails at a vital point. It is upon this subject that the great constitutional struggles of the past have occurred. If representative government fails at this point it fails in all. How does the committee system work in financial legislation?

Financial bills in Congress are of two kinds: (1) Bills raising revenue by taxation; (2) bills appropriating revenue. That is, tax bills and appropriation bills.

In England, the House of Commons originates neither bills for raising revenue nor bills for spending revenue.

**English and American Practice in Money Bills Compared.** Once a year the Chancellor of the Exchequer lays before the House a full statement of the revenue and expenditure of the past year, with an estimate of the needs for the next year, and suggestions of the means of raising the estimated amounts.

These suggestions are embodied in resolutions, and when the House has accepted them bills are brought in in harmony with the Chancellor's plan. The estimates are debated in the Committee of the Whole. "Members may propose to reduce any particular grant but not to increase it; no money is ever voted for the public service except that which the Crown has asked for through its Ministers."<sup>1</sup> The Crown, or the Ministry on its behalf, must not ask for more than it needs. If the year ends with a surplus the Ministry have overtaxed the people; if there be a deficit they have been incompetent in their estimates. The conduct of the Government in these respects shows whether it is capable or incapable, whether it should be turned out or kept in.

In the United States, the Secretary of the Treasury corresponds to the English Chancellor of the Exchequer. The Secretary sends to Congress annually a written report containing a statement of the income and expenditures for the preceding year; he sends, also, estimates for the coming year, with recommendations as to methods

<sup>1</sup> Bryce, vol. i., p. 175.

of taxation. Here the Secretary's agency in the matter ends. All financial legislation is then conducted by Congress and its committees.

The committee for raising money is the Committee on Ways and Means, of eleven members. This is the most important committee of the House. The chairman of this committee is the leader of his party on the floor, ranking next to the Speaker. The chief business of this committee is to report ways and means of raising money. Revenue bills are originated in this body, although the committee may decide to adopt as a measure to be reported to the House some bill communicated to it, publicly or privately, by the Secretary of the Treasury. The report of the Secretary of the Treasury is referred to this committee, but the committee is not bound, either by law or custom, to base its bills and measures upon this report. If the Secretary be of the opposite party from the majority of the House, which is frequently the case, the committee will be apt to disregard, or it may even antagonize his suggestions. It would seem that in originating and presenting bills to determine how much money should be raised, the committee ought to know how much will be spent. But the committee does not know this, for the various spending committees of the House, the chief of which is the Committee on Appropriations, may cause the appropriations to exceed the revenue and thus produce a deficit. The need of concerted action between these committees is apparent. Sometimes the Committee on Ways and Means provides for raising much more money than the Government needs,—the tariff being levied primarily for protection, without regard to whether more or less of revenue be needed. In the House the revenue aspects of the bills are too much neglected, and debate turns very largely on whether certain provisions involve injury or benefit to the

Ways and Means Committee.

*g. H. H.*

Need of Concerted Action between Committees.

*W. H. H.*

policy of protection, or to certain influential industries. The man most responsible for financial bills, for their composition and effect, is the chairman of the Committee on Ways and Means, and the principal tariff bill usually takes his name,—as the “Mills Bill,” the “McKinley Bill,” the “Dingley Bill.”

*Committee on Appropriations.* The business of spending money formerly belonged to the Committee on Appropriations.

This committee was but second in importance to that on Ways and Means.

“It inherited from the Committee on Ways and Means the right to claim the floor at any time for immediate consideration of its reports. Therefore, any measure to which a majority of its thirteen members and the Speaker would assent was assured of consideration in the House and might even be forced through as a ‘rider’; and any measure to which its majority refused assent could not be considered.”<sup>1</sup>

The House was thus under the guardianship of thirteen of its members. It was said that Mr. Randall, of Pennsylvania, sometime chairman of the Committee on Appropriations, would sit in the House with his pockets full

*Special Privileges of the Chairman of the Appropriations Committee. Licensed Committees.* of special appropriation bills, and when he saw any measure coming up to which he was opposed he would rise in his place and offer an appropriation bill. As such a bill always had the right of way it would block the other measure, and thus the chairman of the committee

was able to prevent legislation to which he or his party was opposed. The Committee on Ways and Means, on Appropriations, on Printing, and on Elections were, in this respect, especially licensed committees; they possessed the right to have their business considered at any time.

In 1883, the Committee on Rivers and Harbors was

<sup>1</sup> MacConachie, *Congressional Committees*, p. 180.



made a permanent committee of the House, and grants of money for "internal improvements" were assigned to it. These "internal improvements" include the working of rivers and harbors, and, in general, the improvement of navigation.

Committee on  
Rivers and  
Harbors.

This is a source of great waste, extravagance, and corruption,—a means by which members seek to turn public money into their own States and districts. A member votes for a bill, however extravagant and wasteful, if it provides a good appropriation for his district,—if by it a good sum of public money is to be spent among his constituents. The member acts, not as a representative of the whole country bound to guard the interest of the whole country, but as the representative of a special locality. This practice of voting away public money to various localities is known as the "distribution of public pie," and it is carried out by means of "log-rolling." "You help me with my measure, with some public buildings for my district, and I'll help you with yours." A California member, while acknowledging that an appropriation for public works was flagrantly extravagant and wasteful, excused his urging it upon the ground that while the "pie" was being passed around his people ought to have a share.

"Log-Roll-  
ing" and  
"Public Pie."

In 1885, the House further changed its rules so as to take from the Committee on Appropriations the jurisdiction over one half of the regular annual appropriation bills, giving to eight different committees of the House the right to report and control such bills.<sup>1</sup> These special committees are:

The Committee on Foreign Affairs.

The Committee on Military Affairs.

The Committee on Naval Affairs.

The Committee on Post-Offices and Post-Roads.

<sup>1</sup> Hon. J. G. Cannon, in the House, March 4, 1897.

The Committee on Fortifications.

The Committee on Indian Affairs.

The Committee on Invalid Pensions.

These committees, with the Committee on Rivers and Harbors, having the power to determine fully one half of the Government appropriations,

“each pursues its own way, without reference to the others, and none of them is guided further than it chooses by the Treasury Department. All the expenditures which they recommend must be met by appropriation bills, but into the propriety of these bills the Appropriations Committee cannot inquire.”<sup>1</sup>

The Congress whose final session expired in March, 1897, appropriated \$1,043,000,000,—the largest sum raised by any Congress in our history since the Civil War. Hon. J. G. Cannon, Chairman of the Committee on Appropriations, said at this time:

“The appropriations are in excess of the legitimate demands of the public service. This is not chargeable to either of the great political parties. It comes from the rules of the House, from the rules, practices, and courtesy of the Senate, together with the irresponsible manner in which the Executive submits to Congress estimates to meet expenditures. If congressional appropriations are extravagant and beyond the revenues of the Government, how much more so have been the estimates of the Executive!”<sup>2</sup>

Mr. Cannon further asserted that when the General Deficiency Bill came up to the Senate it became “a mere vehicle for the Senate to load up and carry through every

<sup>1</sup> Bryce, vol. i., p. 178.

<sup>2</sup> *Congressional Record*, vol. xxix., Part III., p. 73, appendix, 54th Cong., 2d sess., March 4, 1897. See also the remarks of Sayers of Texas, on behalf of the minority.

sort of claim that should have no consideration except as independent bills through competent committees." In the Rivers and Harbors Bill, which passed in 1896 over President Cleveland's veto, one work involving \$1,000,000 in expenditure was afterwards rejected as worthless by the War Department, while another of \$4,500,000 was subsequently passed for half that sum.

The evils are: (1) excessive estimates by the Executive departments, (2) defective rules of Congress, (3) the working of the two Houses at cross-purposes.

The revenue bills, having passed the House, are considered in the Senate. They may be amended there; some items may be stricken out, others added. The amended bills go back to the House, and the House usually rejects the amendments; the Senate adheres, and a conference committee, consisting of three The Conference Committee. members from each body, is appointed; a compromise is settled hastily and in secret, and is accepted in the hurry of the last days by a reluctant House.

"The bills are scattered among eight separate committees; they are considered with no attempt at mutual responsibility, and without the slightest reference to the revenue-raising plans of the Ways and Means Committee; there is expert 'log rolling' in one House and senatorial courtesy in the other; and when to these considerations is joined the fact that the President must either approve an appropriation bill or throw it out altogether by his veto, the course of events can easily be determined in advance."<sup>1</sup>

Mr. Bryce's criticism in this connection is of interest and importance:

"In this important matter of managing the national finances the Administration, instead of securing that each department gets the money that it needs, that no money goes where it is not needed, that revenue is procured in the least troublesome

<sup>1</sup> "Congress and its Appropriations," *The Nation*, vol. lxiv., p. 196.

and expensive way, that an exact yearly balance is struck, that the policy of expenditure is self-consistent and reasonably permanent from year to year, is by its exclusion from Congress deprived of influence on the one hand and of responsibility on the other. The office of Finance Minister is put into commission and divided between the chairmen of several unconnected committees of both houses. A mass of business which specially needs the knowledge, skill, and economical conscience of a responsible ministry is left to committees which are powerful but not responsible, and to houses whose nominal responsibility is in practice sadly weakened by their want of appropriate methods and organization.”<sup>1</sup>

What remedies are proposed for these evils?

Remedies for  
the Abuses of  
the Committee  
System.

1. The introduction into Congress of the English system of ministerial government, or something like it. Let the President select the members of his Cabinet from members of Congress, and let these continue to hold their seats in that body while doing their work as heads of departments.

1. Ministerial  
Government  
in Congress Is  
Not Probable.

Those who propose this remedy hold that the evil of our committee practice comes from the American dogma of separating the Legislative from the Executive body. These, it is asserted, should be more closely connected, and if the Executive could by its influence and control bring the Legislative department to act in harmony with it, unity and responsibility in legislation would be promoted. This change would necessitate a constitutional amendment, and it is not probable that it will ever be accomplished. The securing of an amendment is such a slow, difficult, and ponderous task,—none having been added now for a hundred years except as the result of upheaval and war while eleven of the States were practically under military government,—that this change may be dismissed as an im-

<sup>1</sup> *American Commonwealth*, vol. i., p. 212.

probable, if not impossible one. Besides, our written Constitution provides for the separation of the departments of government, and in their practice Americans have come to accept this governmental system. Whatever change is found desirable and necessary in bringing the Executive and Legislative departments into unity and working harmony must be brought about by the law of our unwritten constitution, by the custom and usage of allowing the Secretaries to influence the conduct of Congress by proper touch and contact with the congressional committees. It is evident that the Executive ought to be in constant touch with the Committee on Appropriations, and ought to be able, even before a bill is reported to the House, to expose its defects and extravagances. The committees of Congress and the heads of departments should work together, more and more, to bring harmony and honesty to financial legislation. This can be done in a greater degree than it has been, without a constitutional amendment.

2. A second suggestion as a remedy for the evils of the committee system is, that all appropriation bills be sent to *one* committee for their first consideration. In addition to the regular committees there should be established a Congressional tribunal made up from both Houses to consider all the special claims with which appropriation bills are now loaded, and which have no proper standing in such measures.<sup>1</sup>

While the two Houses are co-ordinate in legislation and responsibility, and while the Senate has the power to amend revenue bills and originate appropriation bills, it will be impossible to concentrate responsibility for financial legislation in a single committee of the House. If the two Houses are in party harmony, a joint committee

<sup>1</sup> Suggested by Mr. Cannon, in remarks cited on p. 292.

Custom will  
Regulate the  
Co-operation  
of the Depart-  
ments.

2. A Central  
Guiding  
Committee.

A Congress-  
ional  
Tribunal.

of the kind suggested might be held by the country responsible for the kind of financial legislation which it permits. But if the House and Senate are of different parties and their Joint Conference Committee on Finance cannot agree, the people will have to rely upon the elections and electoral methods to bring the Houses into harmony,—by disapproving and changing the political complexion of that body whose course has seemed blameworthy.

3. As a means of adding further to party responsibility it is proposed that the Speaker, instead of giving representation on the political committees to the minority party, should make up these committees entirely from his party majority.<sup>1</sup> By the Party Only. "political committees" is meant those which

shape administration, like the Committee on Appropriations, Ways and Means, the Military, Naval, Inter-State, and Foreign Commerce Committees, and Committees on Reform in the Civil Service, Rivers and Harbors, Rules, and Territories." Not both parties, as now, but only one party should have places on the ruling committees. The party in power would then be more fully in power, and it would then be more directly responsible for the work done. This change could be brought about by the action of the Speaker alone. The minority members of the House, like those in the Commons on the Opposition benches, would then be merely critics and censors of those

responsible for the conduct of the House. This would be contrary to all precedent, but if a capable and courageous Speaker, like Mr. Reed, should venture to set another precedent for a century to come, he might do much to promote the

*The Minority as Censors of the Conduct of the Majority.*

<sup>1</sup> See Professor Woodrow Wilson's *Congressional Government*, p. 99, and also a suggestive pamphlet by Capt. F. E. Chadwick, of the American Navy, on *An Unsolved Problem of Our Governmental System*.

<sup>2</sup> Captain Chadwick.

efficiency of party government and to enable the people the more easily to hold their public servants to account.

“There would then certainly be a compact opposition to face the organized majority. Committee reports would be taken to represent the views of the party in power, and instead of the scattered, unconcerted opposition, without plan or leaders, which now sometimes subjects committee proposals to vexatious hindrances and delays, there would spring up debate under skilful masters of opposition, who could drill their partisans for effective warfare and give shape and meaning to the purposes of the minority. But of course this cannot be done so long as the parties are mingled together in a common organization.”<sup>1</sup>

Woodrow  
Wilson on  
Party Re-  
sponsibility in  
Legislation.

X

Of this proposal Captain Chadwick says:

“If the Committees on Appropriations, Ways and Means, and on Rules, were united and made up wholly from the prevailing party, it would, with its power to raise money and with the general control which it should have of bills for expenditure drafted by other committees, as those of Rivers and Harbors, Public Buildings and Grounds, etc., be able to control the national expenditures. The party in power would thus become wholly responsible for the means of raising money and for the money it spends; for the things it does and for the things it fails to do. And if to this Committee were added the Committee on Rules, the new Committee would become a great Steering Committee, taking also the place of the party caucus, and we should have in this a body of men unable at least to shift responsibility either in Congress or before the country; and this responsibility would finally attach to the party to which it belonged with a weight now almost altogether wanting.”<sup>2</sup>

Captain  
Chadwick

It must always be borne in mind, however, that neither rules nor machinery nor organization will ever prevent

<sup>1</sup> Wilson's *Congressional Government*, pp. 99, 100.

<sup>2</sup> *An Unsolved Problem*, p. 8.

misgovernment, if the spirit and purpose of misgovernment abide with those entrusted with responsibility and power. No doubt one committee will do better than eight or twenty. An organized party committee of the strongest congressional leaders, on which the pressure of public opinion can be brought to bear, may be the means of bringing party pressure upon their followers, and this would do much to check waste. But no device can change the disposition of Congressmen to extravagance and corruption.

"The Congressman who wishes to bleed the public treasury must be told that there are larger interests to consider than a government building for his town or the pension agents of his district, or his contractor acquaintances in the lobby, or there will be no hope of improvement in this vicious legislation."<sup>1</sup>

This concentration of responsibility on a few party leaders is being worked out partly by the increasing importance and power of the majority of the House "Steering Committee," the Speaker, and his party colleagues of the Committee on Rules. Under the party government of the House it is coming to pass that what the House does it does by the consent of this committee. These party leaders, and especially the Speaker, should be held strictly responsible. If they do well they should receive the credit; if they do ill, a House should be elected under obligation to displace these leaders from power, and to appoint others in their stead. Without a public sentiment quick to condemn misgovernment other remedies are hopeless.

In the House of Representatives, as in the House of Commons, each party has its appointed recognized leader. The leader in England, however, has more control of his party followers than in America. In each case the leader

<sup>1</sup> *The Nation*, vol. lxiv., p. 196.



has an agency for securing united and reliable party action. In England this party agency is the Parliamentary "Whip"; in America it is the House "Caucus." The Whips, or Whippers-in, in the Commons, are appointed by the party leaders to aid them in conducting the party business in the Commons. The Government Whip is likely to be a leading, experienced member who has the confidence of the Ministry. He is expected: (a) to inform the members on Government business, to explain to them the merits of a measure, or to tell them how to vote, if from absence or inattention they are ignorant of the business in hand; (b) to "keep a house," that is, a quorum, ready to pass Government measures when they come up, to make sure that the party majority are there ready and willing to pass the party measures; (c) to act as tellers, to count members when they pass out on a party division; (d) to obtain pairs for party members, if they cannot be present at a division; (e) to keep touch of party opinion in the House and to inform the leader to what extent he may depend upon party support. Without the Whip the Ministry could not be sure of its majority.

*The English Whip and the American Caucus.*

*Functions of the Whip.*

In the House of Representatives these functions are performed, wherein they are needed at all, by the party caucus or by the Caucus Committee which acts as a party steering agency. It is not so important in Congress that every measure put forward by the leaders should pass, for no one can be turned out by an adverse vote. Party members are not so completely under the control of the leaders, and they more freely and more frequently vote their individual ways. If it is desired by the leaders to bring all the party members solidly into line for a measure it must be made a "caucus measure." The Caucus Committee appointed by each party at the beginning of each Congress

*Methods of the Party Caucus.*  
*in Congress*

✓

will call a meeting of all the party members, and if it is decided at this meeting to approve the measure, the obligations of the caucus and the force of party loyalty are then brought to bear to induce all to vote for the measure. Objecting members are "whipped into line" by these party influences. It is not often that individual members bolt the caucus action. The member who consents "to go into caucus" on a measure is in honor bound by the party action. "To bolt" would bring him into party disfavor, and he would be likely to fail of renomination. When there has been no caucus action on a measure a member is free to vote as he pleases and still claim good party standing, though he may differ from a majority of his party colleagues. This allows a pretty wide difference of opinion within a party without causing disruption. Disruption occurs when men bolt party conventions and party caucuses. Not so many questions are made the basis of party voting in the House of Representatives as in the Commons, but on party questions party forces are as strong and party lines are as closely drawn.

Collisions sometimes occur between the Senate and the House, when the two bodies cannot agree on important measures of legislation. When the disagreement over a bill cannot be adjusted a deadlock occurs, and the proposed measure is lost or postponed. If the collision, or deadlock, occurs over a bill appropriating money necessary for the maintenance of the Government, or upon some important measure that the country is demanding, or that both Houses feel should be passed, some solution of the difficulty will be found in the Conference Committee. Each House appoints a special committee, and these two committees are expected to meet in conference and, if possible, adjust the difference. The result is generally a compromise of the differences that exist. The famous Missouri Compromise of

Collisions between the Two Houses.

The Conference Committee.

1820, for instance, was evolved in this way. If the two conference committees unite in a report to both houses in support of the compromise and the report be supported there by all the conferees, the arrangement will probably be accepted by both Houses. If no arrangement can be reached in the Conference Committee, the proposed measure, of course, fails.

The legislative "rider" <sup>1</sup> is sometimes employed by one House against the other, in order to coerce, or induce, the passage of measures. In 1820, the Senate, Legislative  
Riders. in order to overcome the opposition of the House to the admission of Missouri as a slave State, attached the bill admitting Missouri as a "rider" to the Maine Bill. The two were sent to the House bound in one bill to be lost or passed together. X

In conflicts of this kind between the houses the Senate will be likely to win the greater number of points. Its members are more experienced, and as many of them have been members of the House they know the ways and weaknesses of that body; and as the Senate is a smaller body its majority can be held together better. Being a permanent body the Senate can afford to wait; if it does not get what it wishes this year, there are years yet to come for at least two thirds of its members, while the Representatives, being members of a transient body, may be serving their last year. A Representative's political fortunes and influence may be enhanced by deferring to the Senators.

Although the Constitution designed the separation of the Executive and Legislative departments, some political connection between the two has been inevitable. Political practice has brought them into Relations of  
Executive and  
Congress. necessary relations. A recent President is said to have complained that he "had a Congress on his hands"; while managing the affairs of the Administration X

<sup>1</sup> P. 307.

he had also to manage Congress,—to induce it to promote, or to prevent its interfering with, the public interests. This indicated Executive presumption, and it was a reflection upon Congress. It was resented by a member, who complained that Congress “had a President on its hands,” whom they had to instruct and restrain. The departments are not thus answerable to one another. The legislative policy of Congress is not to be guided by the Executive, nor the Executive policy by Congress. Each department is to attend to its own business and neither is to handle or control the other. While the Constitution does not acknowledge a political relation between the departments, nevertheless, political usage, outside of the Constitution, or in violation of it, has led the two departments to bring their influence to bear the one upon the other.

Each Department Is Responsible to the People for its Own Conduct.

Indirectly the President may influence the action of Congress in the following ways:

How the President may Influence Congress.

1. By his message to Congress.

The annual messages of Washington and John Adams were delivered before the two Houses in person. In those days the President’s speech on this state occasion at the opening of Congress was an affair of considerable pomp and ceremony, corresponding to the king’s speech from the throne.

The President’s Message.

Jefferson discontinued this custom and sent a written message, a precedent which has been followed since. The President’s annual message is now a long and able paper, reviewing the state of the country and urging its needs upon the attention of Congress. It serves merely as advice to Congress which that body is in no wise bound to follow. The President may at any time send a special message to Congress, urging action on a particular cause.

2. By calling Congress into extraordinary session and urging particular measures of legislation.

This is, on occasions, a very effective influence, though, if Congress be hostile to the President's proposals, it may reject them and adjourn without action.

3. By the use of his veto, or by the knowledge that he will use the veto against proposed legislation. A bill may, on this account, be modified to meet the President's views, privately communicated. The President may let it be known that he will veto or approve bills in which members are interested, as a means of influencing their conduct on other measures favored or opposed by the Executive. This, of course, is unbecoming Executive conduct.

4. By contact and communication through the Executive departments, with the congressional committees and their chairmen.

It is the unwritten law that the Cabinet officers may not appear before the houses to advocate their measures. But there is nothing in the Constitution or the written law to prevent this, and it would be altogether proper for a Secretary to appear in Congress. In the early years of Congress, however, proposals to have a Secretary before Congress were resented as involving Executive interference or control. When Hamilton was called upon in 1790 for his famous Report on the Public Credit, the question arose whether it should be submitted in person, to be spoken, or in writing, to be defended there by some Representative who could be relied upon to reflect the opinion of the Secretary. The Congress preferred the written report, and subsequent Secretaries have followed this precedent, and it would now be very unusual for a Secretary to appear before one of the houses to present or advocate his measures. He may, however, appear before any one of the committees. The Secretary's written reports are the formal and usual way of making his influence felt on the Committee, but there are more positive ways. These come by personal interviews and contact

with the committee chairmen and, on proper occasions, by personal recommendations and arguments before the committees themselves. The committee takes the initiative in bringing the Secretary, or one of his departmental officers, before it. He may be summoned as a witness, or called upon to answer questions or to give information, and he may be allowed to advocate his proposals. A favorable committee may thus enable a Secretary to bring before it, and, through it, before Congress and the country, the arguments in favor of his policy. Though this is an indirect, it is a very effective, way of influencing Congress.

5. By the distribution of executive patronage.

The President may give places to Congressmen or their friends, if they consent to support his policy in Congress, and he may withhold appointments from those who refuse. This is sheer bribery and a palpable source of corruption. This would lead Congressmen to vote, not according to their own independent judgment, not according to the merits of the bill or the interests of the country, but according to the party and pecuniary interests of themselves or their friends. It was in this way the English kings, by the places and favors which they had to bestow, corrupted and controlled Parliament and exercised executive tyranny. In practical politics it is known that this practice exists to a degree, but public sentiment is so pronounced against it that no President, or his friends, would admit that he had been guilty of such corrupt abuse of his power.<sup>1</sup> A President who would do so would deserve impeachment and disgrace, and the people cannot be too jealous in guarding their representatives against such a palpable and corrupting abuse of executive power. In the same way, but in a more vulgar form, the executive departments have been charged with attempting to influence Congress by

<sup>1</sup> See p. 186.

awarding department contracts to nominees of Congressmen.

On the other hand, Congress may bring influence to bear upon the President in the following ways:

How  
Congress  
may influence  
the Executive.

1. By resolution, calling upon the President, or an executive department, to take a certain course, or censuring steps already taken. The President is not bound to notice such a resolution, nor in any way to act upon it. But, as a rule, a President prefers not to have his course condemned by the legislative branch of the Government. When President Jackson was censured by the Senate, in 1833, for the removal of the deposits from the Second United States Bank, the President sent his protest to the Senate, and his political friends did not rest until the resolution of censure was expunged. While a resolution may not alter in the least the course of the President, it may lead him to defend his policy before Congress and the country.

2. By an investigating committee. This may be appointed to inquire into the course of a department, to expose it before the public, or to embarrass the President politically, or to make campaign capital against him. This committee may summon a Cabinet officer to appear before it. The Secretary may legally refuse, though he is not likely to; but he is not bound to answer the committee's questions, nor to help it obtain the information which it seeks. The Secretary is responsible to the President, not to Congress or its committees. A Secretary will go a good way to avoid the annoyance of an investigation, and if he should refuse co-operation by trying to conceal information he would bring his department under public suspicion.

3. Congress may refuse legislation which the President requests, in order to embarrass him or force him to comply with the wishes of Congress. This would be on a par

with the President's vetoing a bill favored by Congress in order to bring that body to his terms. It is beneath the dignity of either department, and neither should be moved by such tactics.

4. By impeachment. The fact that Congress possesses this weapon of attack will restrain the President from any executive procedure on which impeachment proceedings might be based by a hostile Congress. Impeachment is a heavy weapon. It will not be brought to bear against the President except in extraordinary cases, or for political purposes, to remove obstruction to the policy on which Congress is determined.

5. Congress may pass bills restricting the scope of executive acts, requiring a certain course of the President or his Secretaries, and forbidding them to do what they had hitherto been left free to do. That is, they may attempt to tie the Executive down to the course prescribed by Congress. The President may veto the bills restricting his executive action. If Congress pass them over his veto and the President still disregard and refuse to obey them, alleging that they are unconstitutional and that they interfere with his executive independence, he would be subject to impeachment. The President may be right in his constitutional views, and his views may even have the endorsement of the Supreme Court; but the Senate will judge for itself of the constitutionality of the laws that the President has disregarded, and against the Senate's findings in the trial executive and judicial opinions will not save him. It may be proper, as a means of determining which is right in such a conflict, and as a means of testing the legality of particular executive acts under the disputed laws, to have a case brought before the Supreme Court. If the Court decides against the President and he still refuses to obey and enforce the law, impeachment is then the only weapon which Congress can use against him. If two thirds of both Houses



have voted for the law which the President is defying, it is probable in such a case that the President would be removed by impeachment. This process of bringing the President to terms would be difficult; for, in the first place, it might be difficult to get a case before the Supreme Court and a decision from that body before the expiration of the President's term; and, in the second place, Senators who might have voted for the policy of a law might not be led to vote for the President's conviction on a purely judicial question as to the extent of its violation; and because no single offence named in the indictment could be clearly made out. "Impeachment is the heaviest piece of artillery in the congressional arsenal, but because it is so heavy it is unfit for ordinary use."<sup>1</sup>

6. Congress holds the power of the purse, and by its power to withhold an appropriation necessary to carry out an executive policy it may bring influence and pressure to bear upon the President. Congress may check a scheme which the President favors, by refusing supplies for it. The President cannot carry on military operations without the requisite appropriations. If he were to purchase territory, Congress could withhold the purchase money. But while the President is within the ordinary and constitutional range of his operations, Congress will not attempt to control him and force him, by withholding supplies, to a policy which he opposes. To do that would be to stop the machinery of the Government, and that would injure Congress and the country as much as it would the President. Congress would be "cutting off its nose to spite its face."

7. By the use of a "rider" to an appropriation bill. A "rider" is an unrelated piece of legislation attached to another legislative measure with the purpose of having it ride through on the merits of the measure to which it

<sup>1</sup> Bryce, vol. i., p. 211.

is attached. "Riders" are usually attached to appropriation bills. As these have to be passed it is thought the "rider" will not be thrown out. The practice of tacking to appropriation bills irrelevant and impertinent measures did not begin until more than forty years after the adoption of the Constitution. It then became a common practice and all parties resorted to it when in power. The practice gave rise to abuses, conflicts, and waste of public money. Public opinion became set against it, and many States adopted constitutional amendments requiring that no law shall contain more than one subject, and that subject shall be plainly expressed in its title.

**Riders and Appropriation Bills.**

It is by the "rider" that Congress has most frequently attempted to coerce the President by the use of its money powers. In 1855, the "Anti-Nebraska men," or the early Republicans, in passing the Army Appropriation Bill in the House, attached a proviso, or "rider," forbidding the President to use the army to enforce the acts of the pro-slavery legislature in Kansas. President Pierce and the Democratic Senate denounced this as revolutionary. The Republicans maintained the right of the House to guard the purse and to impose conditions. Mr. Fessenden, one of the early Republicans leaders, said:

**Historic "Riders."**

"In the English Parliament from the earliest times not only have appropriation and revenue bills gone together, but in cases without number it has been the habit of that Parliament to check the power of the Crown by imposing conditions to their appropriations of money. The only mode in which our ancestors of Massachusetts checked the powers of their royal governors was by granting money only on conditions. The power of supply and the power of annexing conditions to supply have always gone together in parliamentary history, and their joint exercise has never been denounced as a case of revolution, or as calling for revolution, or tending to produce

revolution in any shape or form whatever. It is a power essential to the preservation of our liberties." <sup>1</sup>

Senators Wade and Seward spoke to the same effect.

In 1867, Congress used this weapon against President Johnson. It attached to an Army Appropriation Bill a clause virtually depriving the President of the command of the army, entrusting this to General Grant, the General highest in command. President Johnson was powerless, and he yielded because he knew that the bill would anyhow be passed over his veto.

In 1879, this issue was again presented in Congress, and this time executive independence of Congress was established. In the controversy between President Hayes and the House, in 1879, the difference was as to the repeal of the Federal Election Law supervising the control of elections in the States. The House wished to repeal the law empowering the President to use the troops in the South, and thus to leave the control of elections solely in the hands of the States. The House attached its repealing act to the Army Appropriation Bill. The Senate rejected this combination and conference committees were appointed. The Senate stood ready to pass the appropriation bills at any time, but was not willing to accept as riders the proposed independent legislation. The Democratic conferees on the part of the House were determined that if the dominant Republican majority in the Senate insisted upon the maintenance of the objectionable laws and refused assent to their repeal, then the House would refuse, as they claimed the constitutional right to do, to make appropriations to carry on the Government. Consequently the Congress expired and the necessary appropriations were not made. This situation compelled President Hayes to call Congress into extraor-

<sup>1</sup> Cited in *The Abolition of the Presidency*, by Henry C. Lockwood, chapter on "The Veto," p. 92.

dinary session in the spring of 1879, for this special purpose,—to vote necessary appropriations. The new House sent up a bill with the self-same rider. This time the Senate, owing to a change of membership in that body, passed the bill with the rider. In urging this policy of coercion against the President it was said by Mr. Blackburn of Kentucky, on behalf of the House:

“It will then be for the President to determine whether he will block the wheels of Government and refuse to accept necessary appropriations rather than allow the Representatives of the people to repeal odious laws which they regard as subversive of their rights and privileges. . . . Whether that course is right or wrong it will be adopted, and I have no doubt adhered to, no matter what happens with the appropriations. . . . We have the right to vote money; let us annex conditions to it, and insist upon the redress of grievances. . . . The right of the people to withhold supplies is as old as English liberty. Frequently the Commons, feeling that the people are oppressed, have at last obtained redress by refusing appropriations.”

This seemed like an attempt to force the Executive to consent to legislation under the threat of starving the Government to death. Notwithstanding the expressed determination of the House, President Hayes vetoed the bills and Congress was obliged to pass the appropriation bills without the riders. In his veto message President

Hayes said, in substance: The new doctrine, *President and the Legislative Rider.* if maintained, will result in a consolidation of

unchecked and despotic power in the House of Representatives. A bare majority of the House will become the Government. It strikes at the independence of the departments. The House is not entitled to say that its peculiar function is to represent the people; all branches of the Government are representative of the people. The Constitution aims at the independence of

the departments; this independence can be set aside only by the people themselves. The doctrine [of the rider] means the subjection to the House of Representatives of the Senate and the President in their legislative and administrative functions.

This precedent did much to settle the conflicts between the Legislature and the Executive on this point, and encourage the President to resist coercion by the rider. If the President should veto an appropriation bill because of the attachment of an objectionable rider, and Congress should then leave the Government without supplies, the country would hold Congress responsible, and that body would be condemned by public opinion. If the President were allowed to veto single items in an appropriation bill without rejecting the whole bill it would be easy to meet the difficulty. He could then unhorse the rider by his veto and let the appropriation bill proper go through. In this way the President might also defeat petty jobs smuggled into a bill without delaying supplies, and thus save the country much money.

The Veto of a  
Section of a  
Bill.

The principle contended for by the Representatives in these conflicts, wherein they were seeking to impose the will of Congress on the Executive, is historic and of long standing in parliamentary government. But it applies in governments unlike our own, in which the Executive is subordinated to the legislature. In England, and in other constitutional governments in Europe, the legislature controls the Executive and may impose conditions to control executive conduct at any time, always saving to the Executive the right to appeal to the nation. The Executive can exercise no authority except what is conferred upon him by law, that is, by the law of the legislature. The popular struggles of the past have taken the form of an effort by the people to impose their will through their legislature upon their executive agents.

But in America the President derives his authority, not from the law of the legislature, but from the law of the Constitution,—the same source from which the legislature derives its authority. While the law must prevail against the mere will of the Executive, it must be the law of the Constitution, or statute law in harmony therewith. The Constitution was ordained, and all laws made in pursuance thereof should be designed, to secure Executive independence, and might many times defeat the will of the people as expressed through their Representatives in Congress. This may not secure such popular representative government as many would like to see, but it is the kind of government our fathers established in our Constitution. There is a constant tendency in the legislature to subordinate the Executive. Some think that the tendency of the legislature is to become omnipotent in the state.<sup>1</sup> If, even under our form of government, a large preponderant majority of the people wish to have it so, they can accomplish it. When the two Houses agree by a two-thirds vote, the Executive is powerless. It is right that such a preponderant majority of the people should rule without the hindrance of a veto. When Congress possesses this sanction from the people the Executive is swallowed up, and there is no longer a balance of power among the departments. The Congress can bind the President, and if he refuses to respect the bounds assigned to him by Congress, he can be cast out. He becomes only an agent limited by express commands with no volition or discretion left him.<sup>2</sup>

So the chief source of executive strength is in his legislative function, the veto. If he be shorn of that, or if its strength be spent, he is at the mercy of Congress. If he is able to hold his own, it is not, as Mr. Bryce says,

<sup>1</sup> Note the growth of legislative power in appointments and treaties, pp. 165 *et seq.* See note in Ford's *Federalist*, p. 409.

<sup>2</sup> See pp. 100 *et seq.*, on Executive independence.

“by virtue of any properly executive function, but because of the share of the legislative function which he has received; the Executive holds its ground not because of its separation from the legislature but because of its participation in a right properly belonging to the legislature.”

Congressmen are exempt from arrest during their attendance at sessions and in their going to and returning from the same,—except when treason, felony, <sup>Exemption</sup> and breach of the peace are charged against <sup>from Arrest.</sup> them. Jefferson thus explains the intention in this exception: “The laws shall bind equally upon all, and especially those who make them shall not exempt themselves from their operation.” The sessions of Congress must not be interfered with by the enforced absence of any of its members, except on a charge of very great importance. If members were allowed to be arrested and could be compelled to await the processes of law, the people would be unrepresented, and corrupt politicians would trump up absurd and empty charges against a representative of another party, not for the purpose of convicting him of any crime or misdemeanor, but merely to weaken the opposing party in Congress by causing the temporary loss of some of its members. The Congressman at his trial might easily vindicate himself, but by that time the vote on a crucial point might have been taken and his district and principles be unrepresented.

The patronage of Congress is not extensive. The members all have clerks. The House employees, in addition to the clerks of the members, are ap- <sup>Congress and</sup> pointed, supposedly, by the four officers of the <sup>Patronage.</sup> House,—the Clerk, the Doorkeeper, the Sergeant-at-Arms, and the Postmaster. But these officers do not really appoint the House assistants.<sup>1</sup> These places are

<sup>1</sup>In 1901 there were 357 employees of the House, in addition to the members' clerks, with a salary roll of \$400,000.

distributed to members for their influence in securing the election of the chief officers of the House, and many places are created for the henchmen of members. This abuse has been lately exposed, and it has been found that a large number of men are on the pay-rolls of the House who, being nominally appointed to one kind of work, are found to be doing something quite different, or to be at home on a long vacation engaged in the political work of the members appointing them. Men who have a "pull" with some State delegation receive pay for work which other men perform.<sup>1</sup> Extensive

Abuses of  
Patronage by  
"Pull."

abuses in patronage by members rewarding their political workers have led to the suggestion that Congressmen should be debarred by law from recommending the appointment of persons not only to positions under the control of the executive departments but to all positions under the National Government.

The "Third House" is the Lobby. Literally, the lobby consists of the halls and anterooms that surround the legislative chambers. It has come to mean the men and women—there are many female lobbyists—who hang about the legislative chambers and who make it their business to influence members in favor of, or in opposition to, certain measures. These are the professional lobbyists, and they are always paid for their services by the persons interested in the proposed legislation. They may do honorable work for their clients, but frequently their work is that of the corruptionist. On the

<sup>1</sup> A late report to the House on this subject says: "Winthrop C. Jones is carried on the roll as a locksmith at a salary of \$1440, while in point of fact his duties as locksmith are performed by Daniel P. Hickling, who is on the doorkeeper's roll as a session folder at \$75 per month. Thus the position of locksmith, the duties of which require only a payment of \$75 per month during the session, pays to the man who performs none of its duties \$1440 per annum." For account of other specific abuses in this direction see *The Outlook*, March 30, 1901, pp. 701, 702, and Mr. Moody's report to the House, March, 1901.



other hand, many men advocate before committees measures in which they are especially interested, and such lobbying may be honorable and useful public service. When bills are before Congress whose passage would greatly affect private interests it is right that the persons whose interests are affected should be allowed to present their views. Lobbying is a valuable process for bringing out the facts and the arguments in a cause. If the decision can be left uninfluenced by other than the public interests no harm will be done. But men with private interests at stake are more insistent and unscrupulous than men who seek only to guard the public interest, and "lobbying" has come, therefore, to be regarded generally in an unfavorable sense, and a "professional lobbyist" is looked upon as one who is seeking, by hook or by crook, to promote some corporate or private end at the expense of the public welfare. The complex processes of legislation have brought it about that it is almost impossible for a bill to get through Congress merely upon its merits, and the advocates of good claims and worthy public measures must, perforce, employ the lobbyist to manage their measures.<sup>1</sup>

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## CHAPTER VI

### THE JUDICIARY

**T**HE Judiciary is a third department of Government under the Constitution.

The Judicial power of the United States is vested in one Supreme Court and in such inferior courts as Congress may establish from time to time. It was difficult in the Convention of 1787 to secure the power to establish inferior courts, against the objections of the small State party. It was thought that the national courts, being merely appellate in their jurisdiction, would have so little to do that one Supreme Court would be sufficient. The growth of national interests and of national law was not foreseen.

The Judges, both of the Supreme and inferior courts, hold their offices during good behavior. They receive for their services a compensation which shall not be diminished during their continuance in office.<sup>1</sup>

Under the old Confederation there was no National Judiciary. Congress was made a court of appeal in disputes between two or more States concerning boundaries, jurisdiction, and other causes. Congress might establish courts for the trial of piracies and felonies on the high seas, and courts for reviewing cases of capture and other admiralty matters. The Congress itself occasionally acted as a court in inter-

<sup>1</sup> Constitution, Art. III., Sec. I.

State disputes and erected certain admiralty courts which passed on maritime affairs. But neither Congress nor these courts had any power or process of executing their judgments when they were questioned. The Articles of Confederation were construed by the State courts. When national law began to operate upon individuals it became necessary to have a National Judiciary.

**Classes of Federal Courts.** There are three classes of Federal Courts:

1. The Supreme Court.
2. Circuit Courts.
3. District Courts.

The Supreme Court was required by the Constitution itself; the erection of the other courts was left to the discretion of Congress.

In the Judiciary Act of September 24, 1789, Congress carried into effect the provisions of the Constitution as to the Judiciary. This act in its essential features still stands as the statute determining the constitution of the Federal court. In the history of national legislation no Act can be counted of greater importance, so far as legislation has permanently affected any of our institutions. Its abiding influence and importance are enough to immortalize its author, Oliver Ellsworth, of Connecticut.

Originally, by the Act of 1789, the Supreme Court numbered six. There are now nine, a Chief Justice with a salary of \$10,500, and eight associate Justices with salaries of \$10,000 each.

The Justices are nominated by the President and confirmed by the Senate. They are removable only by impeachment.

**How Justices are Removable.** English Justices are removable by the Crown on an address, or petition, from both Houses of Parliament. The securer tenure in America is to ensure the independence of the Judiciary and to prevent their subserviency either to the executive or to the legislative department. The

separation and independence of the three co-ordinate departments of our Government are again guarded at this point.

The regular sessions of the Supreme Court are from October to July in each year. The presence of six judges is required to pronounce a decision. This se-  
Sessions of the Supreme Court.  
 cures a thorough consideration of every case, though it prevents the expediting of the business before the Court. Every case is argued before the full Court; the judgment of the majority of the Court is then expressed, and the written judgment is then prepared by one of the Justices.

Congress has established nine judicial circuits, or nine Circuit Courts. Each of these has two circuit judges with a salary of \$6000, and one Justice of the Supreme Court is assigned to each of these circuits. The circuit court may be held either by a circuit judge alone, or the Supreme Court Justice for that circuit alone,  
Circuit Courts.  
 or by both together, or by either sitting with the district judge, in that district, or by the district judge alone. In 1891, an act established Circuit Courts of Appeals, to which cases may be taken from the circuit and district courts,—a further appeal lying to the Supreme Court in certain classes of cases. This act was for the purpose of relieving the Supreme Court, which was nearly three years behind in its cases.

The District Courts<sup>1</sup> are the third form of the Federal courts. They are at present fifty-five in number. Their judges receive a salary of \$5000.  
District Courts.  
 They are appointed by the President by and with the advice and consent of the Senate.

Congress has erected a Court of Claims for the special purpose of trying claims of private persons  
Court of Claims.  
 against the United States. Appeals may be taken to the Supreme Court.

<sup>1</sup> See Bryce, p. 231, *Statesman's Year Book*, 1898.

What kind of cases come under the jurisdiction of the Federal courts?

**Jurisdiction of Federal Courts.** I. "Cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority."<sup>1</sup>

In any case to which a Federal statute applies suit may be brought in a Federal court. Any defendant who rests

**How a Case may be Transferred from a State to a Federal Court.** his defence on a Federal law may have the case transferred to the Federal court though it may have arisen in a State court. The Judiciary Act of 1789 lays down the rules for removing a case from the State to the Federal court. If

the State court has decided against the validity of a treaty, or law, or authority exercised under the United States; or, if the State court has decided in favor of the validity of a State law or exercise of authority, which is questioned as being contrary to the Constitution, treaties, or laws of the United States; or where the State court decision is against any title, right, privilege, or immunity claimed by either party under the United States Constitution and laws,—in such cases the action may be transferred from the State to the Federal courts.

The principle of the rule is obvious: State construction of a Federal law unfavorable to Federal authority may be reviewed by Federal construction. A State construction favorable to Federal authority needs no review, the Federal power being already sufficiently vindicated.<sup>2</sup> The Federal authority is the final judge of the extent of its powers, and State decisions and actions cannot interrupt the exercise of these powers. This principle applies also to executive acts under Federal authority. Within its legal sphere the United States law operates of its own right, and it is supreme and sufficient; no State authority can resist it. For illustration: A person arrested by a Federal officer may not be released by a State court on

<sup>1</sup> Constitution, Art. III., Sec. 2.

<sup>2</sup> Bryce.

a writ of *habeas corpus*. This was tested in Wisconsin in 1855. A Mr. Booth violated the Fugitive Slave Law of 1850, by aiding a fugitive slave to escape. He was arrested and held in custody by Ableman, the United States marshal. Booth applied to the State court for a writ of *habeas corpus*, and on this writ the highest State court of Wisconsin ordered his release. Chief Justice Taney in reviewing this case for the United States Supreme Court, said:

State Action  
may Not In-  
terrupt the  
Operation of  
Federal Law.

V

“ The powers of the general Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independent of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State Court as if the line of division was traced by landmarks and monuments visible to the eye.”<sup>1</sup>

Booth was retained in custody by force of United States law, and the right of a State, or a State officer, to release him was denied.

2. “Cases affecting ambassadors, other public ministers, and consuls.”<sup>2</sup>

These persons have an international character, and it would not be proper to have their cases dealt with by State authority.

3. “Cases of admiralty and maritime jurisdiction,” *i. e.*, prize cases, and cases relating to navigation.

4. “Controversies to which the United States shall be a party.”

The United States should not be compelled to sue or be sued in a State Court. A money claim against the Federal Government will come up in the Court of Claims.

<sup>1</sup> Booth *vs.* Ableman, 21 Howard, 516. See also Thayer's *Cases*.

<sup>2</sup> Constitution.

## 5. Controversies—

- (a) Between two or more States;
- (b) Between a State and citizens of another State;
- (c) Between citizens of different States;
- (d) Between citizens of the same State claiming lands under grants of different States.
- (e) Between a State, or its citizens, and foreign States, citizens, or subjects.

It was supposed that in all these cases a State court was likely to be partial. A claim of a non-resident, and especially of an Englishman or foreigner, against a citizen of one of the States was likely to be prejudged by local courts and juries in 1787. English creditors could not secure payment of just claims in the State courts from 1783 to 1789.

The suit of a citizen against a State has since been withdrawn from Federal jurisdiction by the Eleventh Amendment. It violated the sense of dignity, independence, and sovereignty of a State to allow it to be dragged into court by a private plaintiff. It was supposed and so announced by Hamilton and Marshall that the clause giving this jurisdiction to the Federal court would not be construed in such a way as to give the right to an individual to sue a sovereign State without its consent. But it was shown in the celebrated *Chisholm vs. Georgia*. case of *Chisholm vs. Georgia*, in 1793, that this construction which Hamilton mentioned as expected, could not be had by mere implication. Federal authority might, by implied powers, become greater than was expected, but not less, and if the Constitution was to be construed as Hamilton and Marshall suggested, it must be as the result of expressed words. *Chisholm* sued Georgia in United States Courts for the recovery of a claim. Georgia refused to appear, and the Supreme Court, Chief Justice Jay rendering the decision, proceeded to construe the Constitution in the way precisely



that Hamilton said it would not be construed,<sup>1</sup> and the Court gave judgment against Georgia by default. This decision alarmed the States, and the Eleventh Amendment passed Congress and was duly accepted by the States. This declares:

“The judicial power of the United States shall not be construed to extend to any suit commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.”

Under the shelter of this amendment several States have been able with impunity to repudiate their debts. The National Government cannot require the States to pay their debts. This condition might involve us in difficulties with foreign powers, if State debts held by citizens of foreign countries were repudiated. Diplomacy could not reach the State, yet foreign citizens would have a grievance. The National Government would probably pay to avoid a foreign complication, as it has repeatedly paid indemnities for injuries done to foreigners within the States. Public sentiment would have to be relied upon to bring the State to fulfil its obligations.

The Supreme Court has original jurisdiction in cases affecting ambassadors and wherever a State is a party. In other cases its jurisdiction is appellate,—that is, cases are brought up to it on appeal from the lower courts, Federal or State. A Federal act cannot impose functions and duties upon a State court; the States may refuse to accept and discharge these duties.<sup>2</sup>

The jurisdiction of the Federal Courts is statutory. That is, these courts derive their powers from the specific grants of the Constitution and the statutes made in accordance with the Constitution. The United States courts have no common-law jurisdiction. Their powers are to be found in the written

Federal Court  
Jurisdiction Is  
Statutory.

<sup>1</sup> See *Federalist*, No. 81.

<sup>2</sup> See *Prigg vs. Pennsylvania*.

law, not in general principles and usages of law. A Federal law applicable to any case prevails, in that case, against any State law; and whether a Federal law is applicable every suitor is entitled to have a Federal Court determine. By this principle clashes of authority between State and Federal courts are avoided and the two jurisdictions work together in harmony over the same people

at the same time. In administering a State law in any case the Federal courts always follow the decisions of the State courts. In the Dred Scott case, 1857, there were those in the Court disposed to regard the issue raised by Dred as purely a Missouri question, to be decided entirely according to Missouri law. This view held that United States law was not applicable to the case; the case did not come under United States jurisdiction. This view was held by the majority of the Court in a part of its decision, and if it had not gone beyond this the Court would have been on safer ground. It would have remanded Dred to slavery, because the highest Missouri court had so ordered in his case. The United States Court regards the State decision as settling any question to which only State law applies. The Supreme Court has overruled its own decisions on points of State law in order to bring itself into harmony with the view of the highest State court. State courts always follow Federal decisions upon questions of Federal law.

**Federal Courts Follow State Decisions on State Law.**

The Federal Marshal is the sheriff of the United States Court. It is the Marshal's duty to execute the writs, judgments, and orders of the court. He may call a posse of citizens to his aid; if that is not sufficient he may apply to the Government at Washington for Federal troops. If the President refuses the necessary force the Court is powerless to execute its decrees, as in the case of Marshall's decision against Georgia, under the presidency of Jackson. The Marshal is the executive

**United States Marshal.**

arm of the Court, and he is expected to protect the Court from disorder and assault. A Marshal appointed to defend Justice Field from a threatened assault, shot and killed the assailant of the Justice and was held not to be answerable to California law, the State in which the justifiable defence was made.<sup>1</sup>

The United States District Attorney is the Federal prosecutor. He institutes proceedings against persons violating Federal law.

United States  
District  
Attorney.

The District Attorney and the Marshal are both under the direction of the Attorney-General of the United States, the head of the Department of Justice. Through these officers Federal authority covers the whole territory of the Union.

From a political point of view the most important function of the Judiciary is its power of declaring an act unconstitutional. This power applies not only to the acts of Congress but to the acts of any of the State legislatures. An act declared unconstitutional by the Supreme Court is as if it had never been.

Power to  
Declare a Law  
Unconstitu-  
tional.

“Rights cannot be built up under it; contracts which depend upon it for consideration are void; it constitutes a protection to no one who has acted under it, and no one can be punished for having refused obedience to it before the decision was made. It is to be regarded as never having, at any time, been possessed of any legal force.”<sup>2</sup>

It is a power not conferred expressly by the Constitution, and when it was first exercised by the national courts, and acts of Congress and of the State legislatures were set aside as null and void and of no force, this exercise of authority created considerable alarm. Jefferson and the States' Rights party were afraid the Supreme

<sup>1</sup> See the case of Neagle.

<sup>2</sup> Cooley, *Constitutional Limitations*, p. 222, cited by Hinsdale.

Court, with this right of overruling Congress and the State legislatures, would make itself such a powerful arm of the National Government that the people would lose control over their laws. It was thought to be dangerous to have their legislative will thus thwarted and interfered with. Therefore Jefferson and his party urged more effective popular control of the courts; that the judges' office should be elective and for a briefer tenure; that they should not be independent of, or that at any rate they should not be superior to, the political arm of the Government. Jefferson and his followers were not willing that the Supreme Court should exercise this power against State laws, as this would be like a national agency vetoing the laws of the States. In the Convention that framed the Constitution in 1787 it was proposed that a veto on the acts of the State legislatures be conferred upon Congress; that any State law that Congress deemed inexpedient or unwise might be vetoed. This was almost unanimously rejected. Later the proposal was modified to allow Congress to veto only unconstitutional laws of the States. There were serious objections to this also. To veto the law of a State, though the law might violate the Federal Constitution, would seem like a political act; it would have offended State loyalty; it would have been difficult to exercise, since Congress would not be constantly in session, and it would certainly have provoked collisions between State and Federal authority. Such an emanation

Was a National Negative on State Laws Inadvertently Conferred in the Constitution?

tion of Federal authority, with power to interfere with the liberty and conduct of the State, would have been a constant irritation. This veto power was consequently denied to Congress. The power having been so denied, is it to be supposed that it had been inadvertently conferred upon the Supreme Court? When the early decisions and interpretations of the Supreme Court brought this power unexpectedly into being, Jefferson and the adher-

ents of States' rights denied this function to the Court. All parties admitted that unconstitutional laws did not bind the people. But Jefferson and the Virginia school thought it "a very dangerous doctrine to consider the judges as the ultimate arbiters of all constitutional questions; that would place us under the despotism of an oligarchy."

They were unwilling that a national agency should be allowed to define the limits of national authority, and when the vital question was raised as to whose prerogative it should be to decide upon the constitutionality of laws, Jefferson asserted, unfortunately, that "as in all other cases of compact among parties having no common judge, each party (presumably each State) has an equal right to judge for itself as well of infractions as of the mode and measure of redress."

Should a National Authority Decide on the Limits of National Power?

V

This was a political doctrine set forth by Jefferson to meet a political issue,—the issue between State and national power. As a political theory it has since been abandoned, because an extreme application was logically made of it that was calculated to undermine and destroy the Union. But it is also abandoned because of the fact that the Supreme Court has attained to the position of an accepted and impartial umpire to settle the constitutional cause then in dispute,—the limits of power between State and Nation. But this power of the Court to declare laws unconstitutional was then new and startling, although it is now exercised without offence to any party in the country,—a tribute to the people's confidence in the Supreme Court. In disputes between the States and the Central Government, Jefferson recognized that there must be somewhere an ultimate arbiter, but the final judgment was not to be with either party to the dispute. "The ultimate arbiter is the people of the Union, assembled by their

The Virginia and Kentucky Resolutions.

The "Ultimate Arbiter" in Disputes between State and Nation.

V

<sup>1</sup> Kentucky Resolutions.

deputies in convention at the call of Congress or of two thirds of the States. Let them decide to which organ they mean to give an authority claimed by two of their organs."<sup>1</sup> But our usage has referred the arbitrament of such disputes on constitutional questions to the Supreme Court, "a body which is to be deemed not so much a third authority in the Government as the living voice of the Constitution, the unfold of the mind of the people whose will stands expressed in that supreme instrument."<sup>2</sup>

The power in the courts to declare a law unconstitutional is distinctly American. It excites special attention

X  
In Allowing  
such Supre-  
macy to the  
Judiciary  
America is  
Unique.

and comment from European students of our politics, and it is a matter of some amazement to them that Americans permit it. Under no other constitutional government does this power rest with the Judiciary. In England, as

we have seen, Parliament is supreme.<sup>3</sup> There all statutes are of equal authority; all were made by the legislature and all can be changed by the legislature. No court would presume to set aside an act of Parliament. An English political leader may declaim against a proposed act of Parliament as "unconstitutional"; but by this he merely means that the act is contrary to precedent or usage; or he may mean that it is contrary to certain his-

1  
"Constitutional  
Statutes" in  
England.

toric measures which in England are called *constitutional statutes*, such as the Magna Charta (1215), the Petition of Right (1628), the Bill of Rights (1688), the Act of Settlement (1701),

the Acts of Union (1708, 1800), the Reform Bill (1832)—important, long-standing measures defining the character of the State and according to which all parties are expected to conduct the Government. But even these great measures may be repealed by act of Parliament.

<sup>1</sup> "Jefferson's Opinions of Marshall and his Court," *American Law Review*, January-February, 1901, and *Jeffersonian Cyclopedia*.

<sup>2</sup> Bryce, vol. i., p. 357.

<sup>3</sup> See pp. 95 *et seq.*

Whatever law Parliament passes, the courts will accept and apply, and if it conflicts with any preceding act, no matter of what importance, the latest act will stand as law. If English judges find an act conflicting with a decided case, "they prefer the act to the case, as being of higher authority. As between two conflicting acts they prefer the latter, because it is the last expression of the mind of Parliament." If an English judge find two laws conflicting he merely looks at the date, and the last law prevails. There is no such thing as an *invalid* act of Parliament. That would be like an unconstitutional constitution. Parliament is the people. It is politically omnipotent and what it does stands in court until the same omnipotent power changes it. Even in other European countries where there are written constitutions binding the legislature, like France, Switzerland, and Germany, the courts are not allowed to declare a legislative act invalid. The legislatures are also the judges of the Constitution, and the courts are bound to enforce the laws of the legislature. In Switzerland, whose Federal court was instituted in imitation of ours, some points of law are reserved for an authority not judicial but political, and the Federal legislature is made the sole judge of its own powers.<sup>1</sup>

However, our Supreme Court has exercised this power to declare a law unconstitutional and to set it aside, and in doing so it has described its exercise to be an essential characteristic of a government under a written constitution. The written constitutions of those European countries that do not recognize this power in the courts have developed on different historical lines than ours. They have come into use after the functions of the courts and their relation to the legislative powers were fixed by usage. In America, under a new Constitution, this important power of the Judiciary became a part of our system,

<sup>1</sup> Bryce, vol. i., p. 260.

partly because first exercised by the Court under the influence of great legal minds like Ellsworth and Jay, and partly, also, because of the tremendous influence in this direction of the great decisions of Chief Justice Marshall. The relation between this power and a written Constitution was first clearly brought out by Marshall when, in his first great decision, he was contending for the right of the Court to set aside an act of Congress. His masterly legal expression of the principle can never be improved upon:

"The original and supreme will organizes the government and assigns to different departments their respective powers.

**Marshall** It may establish certain limits not to be transcended  
**Secures this** by those departments. Such is the government of  
**Power for the** the United States. The powers of the legislature  
**Judiciary in** are defined and limited; that those limits may not  
**Marbury vs.** be mistaken or forgotten the Constitution is written.  
**Madison.**

To what purpose are powers limited and to what purpose is that limitation committed to writing if those limits may at any time be passed by those intended to be restrained? The distinctions between a government of limited and one of unlimited powers is abolished if those limits do not confine the persons on whom they are imposed. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it; or that the legislature may not alter the Constitution by an ordinary act. The Constitution is either a supreme, paramount law, unchangeable by ordinary means, or it is on the level of ordinary legislative acts, alterable at the will of the legislature. If the former part of the alternative be true then a legislative act contrary to the Constitution is not law. If the latter part be true, then written constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable. . . . Certainly all those who have framed written constitutions contemplate them as forming the fundamental paramount law of the nation, and consequently the theory of every such government must be that an act of the



legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution and is consequently to be considered by this Court as one of the fundamental principles of our society. . . .

"It is emphatically the province and duty of the judicial department to say what the law is. If a law be in opposition to the Constitution the Court must either decide the case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the Court must determine which of the conflicting rules governs the case. This is of the very essence of the judicial duty. The courts cannot close their eyes to the Constitution and see only the law. This doctrine would subvert the very foundation of all written constitutions. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure."<sup>1</sup>

To the same effect Chief Justice Chase says:

"When a case arises for judicial determination and the decision depends upon the alleged inconsistency of an act with the fundamental law, it is the plain duty of the Court to compare the act with the Constitution and if it cannot be reconciled with the latter to give effect to the Constitution rather than to the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law, and it would be useless to inquire whether or not an act of Congress is in pursuance of it."<sup>2</sup>

This does not mean that the judicial department is superior to the legislative, but only that the power of the people is superior to both. When an act of Congress is declared unconstitutional there is no conflict between

<sup>1</sup> *Marbury vs. Madison*, Cranch 1.

<sup>2</sup> Chief Justice Chase in the case of *Hepburn vs. Griswold*, 1870, 8 Wallace, 603

the legislative and the judicial departments. The conflict is merely between two kinds of law. The Judiciary must say what the law is and decide every case according to the supreme law,—the law that is to prevail.

There are four kinds of law in America: (1) The Federal Constitution. (2) Federal Statutes. (3) State Constitutions. (4) State Statutes. The Federal Constitution is the "supreme law," and all the other forms of law must be in harmony therewith. If two laws conflict, not the later but the higher prevails; the lower authority must give way. The Court in interpreting the law merely states what the higher law requires and shows wherein the lower law is inconsistent with this. The judges must regulate their decisions by the fundamental laws rather than by those that are not fundamental. It is the *law*, not the will of the judges, that prevails. The will, or opinion, of the judge should have nothing to do with the case. He may think one law good and another bad; as a judge he is bound to allow only that one to stand which is in harmony with the Constitution. If he be guided, not by the law but by his personal interests or his political views, he is unfit for his place, and a decision inspired by such motives will arouse popular displeasure and distrust. If the case were flagrant and odious it might provoke resistance and cause the Court to become the object of public and political attack.

The Court has generally sought to avoid politics, and it has been strong just in proportion as it has succeeded.

Yet it has not always been able to keep itself above political discussion and free from party strife and conflict. Jay's decision in the famous case of *Chisholm vs. Georgia* aroused the adherents of States' rights and they demanded the Eleventh Amendment. The Federalists on the eve of their retirement in 1800 sought to enlarge the scope of the Judiciary and to

Four Kinds of  
American  
Law.

The Supreme  
Court and  
Politics.

provide for some Federalist appointments and John Adams's "midnight judges" aroused party criticism and opposition. The Jeffersonian Republicans, when they came into power, not being able to remove the Federalist judges from office nor reduce their compensation, abolished the courts by repealing the law that created them. It being unconstitutional to remove the judge from the office, they removed the office from the judge. Marshall's nationalizing decisions aroused the opposition of the States' Rights school, and the bank decisions of the Court aroused local political opposition in some of the States. In 1857, the most serious introduction of the Court into the arena of politics occurred by the Dred Scott decision. The chief political issue between parties at that time was as to whether or not Congress should prohibit slavery in the Territories. The Republican party had come into being primarily upon the demand that slavery should be prevented by national power from entering the Territories. In deciding the Dred Scott case and remanding Dred to slavery, which the Court might have done merely by the application of Missouri law,<sup>1</sup> the Court went aside to give its opinions upon the controverted political questions of the day. If the opinion of the Court were to be taken as a guide in the politics of the country, the Republican party had no longer any reason for existence. The Republican leaders, Sumner, Stevens, Lincoln, and others, denounced the decision as partisan, Lincoln and Seward going so far as to accuse the venerable Chief Justice and President Buchanan of collusion in the preparation of the decision. The Republican party still pursued the political course that had been condemned by the Court, and the only injury done was to the Court itself. The Republican party, as a party, denounced the decision as "a dangerous political heresy, revolutionary in its tendency and subversive

Political  
Opposition to  
the Dred Scott  
Decision,

<sup>1</sup> See p. 324.

of the peace and harmony of the country." The Republicans came into power denouncing the Supreme Court and repudiating its decision.

The "greenback" decisions of the Court have also aroused political opposition. Whether Congress should issue legal-tender notes to be used as money, as bank-notes are, is a public financial question to be determined by the political department of the Government. Politically the country is greatly divided upon this question. The Supreme Court has ruled in favor of the constitutional power of Congress to do this. The Court at first decided (1870) that this power did not rest with Congress. But the Court was soon changed in its personnel by the creation of a new justiceship and by the filling of a vacancy, and a new case was gotten up. The opinion of the two new judges was already known from their having passed on similar cases in lower courts, and when the new decision came the majority of the judges held that Congress, in the exercise of a war power, might issue legal-tender notes. Later, in 1884, in still another case, the Court held, with only one dissenting voice, that this power rests with Congress in time of peace as well as in time of war. This decision was thought to be dangerous by some whose political and financial opinions were offended by it.<sup>1</sup>

Previous to the campaign of 1896, the Populist party and many Democratic conventions in the States demanded a national Income Tax, and, in 1894, a Democratic Congress passed such a tax. The Supreme Court, by a vote of five to four, one judge having changed his mind, declared it unconstitutional and set it aside, thus reversing previous decisions on this subject. This offended the Democrats, and in

<sup>1</sup> See George Bancroft's *The Constitution Wounded in the House of its Friends*; James's *Legal Tender Decisions*; *Papers of the American Economic Association*.

1896, the Democratic Convention, like the Republicans in 1860, denounced the decision, saying that it was contrary to "the uniform decisions of that Court for nearly one hundred years," the Court having sustained objections to the law "which had been previously overruled by the ablest judges who have ever sat on that bench." The Democrats also denounced "government by injunction as a new and highly dangerous form of oppression by which Federal judges, in contempt of the law of the States and rights of citizens, become at once legislators, judges, and executioners."

The reversal of the Supreme Court's decision in the legal-tender cases revealed the weak point in its organization. It is within the power of Congress and the President to "pack" the Court, if they have a mind to do so. The number of the Court can be increased by act of Congress from nine to fifteen, or to any other convenient number. If Congress and the President are determined to do what the Court asserts to be unconstitutional they have only to reorganize the Court by increasing the membership and by filling up the Court with judges who will give the desired opinion. If the opinions of the President's new appointees to the Court can be known in advance, almost any case that it is desired to have reversed could be reversed in this way. This would of course impair the usefulness of the Court, and while this manner of controlling it by political legislation is possible it is hardly probable. The respect of the Americans for law and for this their highest legal tribunal may be depended upon to restrain action in this direction. There should be some way by which the sovereign will of the people can work out its purposes, even against the obstacles of court decisions. The Court must be, in the last resort, amenable to the will of the people.

As national judges may declare a State law unconstitu-

~~The Weak~~  
Point in the  
Armor of the  
Supreme  
Court.

X  
is power of  
Congress to  
increase  
it

tional, so may a State judge declare a national law unconstitutional. He may be overruled in this decision by

a national court on appeal, but if a State circuit judge, or even a justice of the peace, finds a national law in his way in the trial of a case

and if, in his judgment, the law is unconstitutional, it is his right, or rather his duty, to say so. If he does not judge aright there is a chance for a higher court to say so.

Although this practice of declaring acts unconstitutional is described by the jurists as merely revealing and

interpreting the law, and not making the law, yet the practice makes possible a good deal of

"court-made law,"—law that is made, or prevented, by decisions and constructions contrary to the legislative intention. In deciding what law we shall have and in the determination of public policies, this practice seems very

much like establishing the supremacy of the courts over the legislature. In 1895, for instance, the Supreme Court of Illinois declared the eight-hour law of that State unconstitutional on the ground that the right to make contracts is

an inherent and inalienable right, and this eight-hour law abridged this right, restricting the fundamental right of the citizen to dispose of his time as he pleased. A New York court has lately held that such a law violates the freedom of contract guaranteed by the Constitution.

The progressive inheritance tax of Ohio, by which it was sought to place a fair share of public burdens upon the receivers of great wealth, was declared to be unconstitutional by the Supreme Court of that State, on the ground that, by a provision of the Constitution of Ohio, citizens of that State may be taxed only in proportion to their property. If the English courts had possessed such powers every one of the progressive labor laws of that country by which the hours of labor for women and

A State Judge  
may Set Aside  
a National  
Law.

Can the  
Judiciary  
Subordinate  
the Legis-  
lature?

children have been shortened might have been overthrown, and the Progressive Income Tax law might have met the same fate.

“ These decisions illustrate the fact that the American system of the supremacy of the courts is less democratic in practice as well as in theory than the English system of the supremacy of Parliament. Parliamentary government makes possible more legislation in behalf of the common people than government by the courts. The contrast between the English and American systems brings out strongly two points: first, that written constitutions instead of being a safeguard for the common people may be a safeguard to vested interests; and secondly, the fact that in England Parliament is supreme and can do almost anything facilitates the passage of progressive laws to an extent that is impossible where courts are supreme.” <sup>1</sup>

The Court never goes to meet a question. It awaits the question to come before it by a suit at law. Smith sues Brown in Texas, and after the decisions of lower courts in that State and after the law’s further delays, the case comes up on appeal to the Supreme Court. It is only then that the Supreme Court can notice the questions involved, though they may have been discussed in Congress and in political circles for years before. The Justices will not express an opinion upon the constitutionality of a law in advance of a case arising under it, nor upon any proposed measure. They will not advise the Executive as to the constitutionality of a law. In 1793, Washington requested the opinion of the Court on the construction of the French treaties of 1778. The Justices refused to comply. In some States the constitution requires such an opinion from the court as a speedy means of determining the status of the law. In such cases an opinion on a proposed law becomes a constitutional duty. In the absence

How Cases  
Arise and  
Decisions  
are Secured.

<sup>1</sup> *Outlook*, April 6, 1895.

of such a means of coming by an authoritative decision, the Executive must consult his Attorney-General. A Justice while ruling upon a law is, of course, in no way bound, not even by the law of consistency, to decide in harmony with an opinion he may previously have expressed while acting in another capacity. In 1862, while Chief Justice Chase was Secretary of the Treasury he urged the passage of the Legal Tender Act and he expressed the opinion that it was constitutional. In 1870, while acting as Chief Justice, he rendered a decision against the constitutionality of this law.

The great function of the Supreme Court in the development of our Government has been the *interpretation* and *construction* of the Constitution.

The Constitution has changed and developed in three ways: 1. By amendments; 2. By interpretation and construction; 3. By usage.

The Con-  
stitution  
Develops:

1. By Amendment. *Amendments* to the Constitution may be made in two ways:

(1) Congress may by a two-thirds vote of each house prepare and propose an amendment. If this be ratified by the legislatures of three fourths of the States it becomes a part of the Constitution. Fifteen amendments have been obtained in this way. Of these, however, ten were obtained at the beginning, urged almost as a condition precedent to the adoption of the Constitution, and these ten may be regarded therefore as a part of the original instrument, while the last three amendments were approved by a sufficient number of States under very extraordinary political circumstances. In more than one hundred years only two amendments have been added under ordinary conditions. Growth by the process of amendment is very difficult and laborious.<sup>1</sup>

(2) The other method of amendment is that Congress, upon the application of the legislatures of two thirds of

<sup>1</sup> See p. 347.



the States, shall call a Convention for proposing amendments, these proposals to be valid when ratified by the legislatures of three fourths of the States. No amendment has ever been obtained by this method.

While the Constitution has developed considerably by amendment, it has been developed much more by *construction* and *interpretation* and especially by *construction*. Interpretation and construction are frequently used interchangeably, but a distinction between them should be drawn. Interpretation has to do with the meaning of the written text. It is the art of finding out the true sense of any form of words; it applies to questions as to the meaning of a term or phrase, with the purpose of making clear and understood any passage that was before ambiguous and uncertain. A case arises, and it is claimed that the Constitution says something which bears or is supposed to bear upon the matter. What do the words in question mean? And do they bear upon the case? These are questions of *Interpretation*. *Construction* has to do with the Constitution as a whole. It seeks and applies the probable aim and purpose of the whole document, determining what powers result from it or are implied in it. Construction compares one part of the Constitution with all other parts and it takes cognizance of subjects that lie beyond the direct expressions of the text,—as, for example, the nature and character of civil government and of sovereignty, and the evidences from history and contemporary expression as to the purposes in the making of the Constitution. By liberal or broad construction, the Constitution has been greatly developed and the limits of power have been more and more closely and clearly defined. It is upon *Construction* that the great political and constitutional differences in our history have arisen. *Interpretation* has been chiefly a matter of law; *Construction* has been largely a matter

2. By Interpretation and Construction.

Difference between Construction and Interpretation.

of *politics*. By this it is meant that the political departments of the Government have also construed the Constitution. Construction has had to do with a field that has offered a fundamental issue between political parties in America, the issue between national powers and States' rights. But the permanent and effectual construction which has been more or less accepted by all parties as determining the scope of constitutional powers and the character of the Government is the construction of the Supreme Court. This construction has come as from a judicial and impartial arbiter, but it has had very important political bearing.

*Marshall's principles of Construction* as to the extent of national powers may be accepted as final. His two canons of construction are:

**Marshall's  
Principles of  
Construction.**

1. Every power claimed by the National Government must be affirmatively shown to have been granted. There is no presumption in favor of such power. The burden of proof rests with those who assert its existence. Something in the Constitution must be pointed out that expressly or impliedly confers this power.

2. When once the grant of power is established the powers will be construed broadly. When it is shown that the end is legitimate, that the proposed power is constitutional, any reasonable means may be allowed. The Court will be *strict* in determining the existence of a power, but *liberal* in applying the power if found to exist. When the people have conferred a power they have conferred a wide discretion as to its use.

During the Civil War, President Lincoln's construction of his powers rested upon a higher law than the mere words of the Constitution. He held that his oath to preserve the Constitution imposed upon him the duty of preserving the nation of which the Constitution was but the organic

**Lincoln's  
Construction  
of His War  
Powers.**

law. It was not possible to lose the nation and yet preserve the Constitution. "So a measure, otherwise unconstitutional, may become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation." Any government, in order to preserve its own life, will construe its powers in such a way as to justify its overstepping its ordinary limitations in periods of extraordinary danger.

"The creation of a system of United Courts, extending throughout the States, and empowered to define the boundaries of Federal authority, and to enforce its decisions by Federal power supplied the element needed to bring order out of chaos. Without it the Constitution might easily have proved a more disheartening and complete failure than the Articles of Confederation."<sup>1</sup>

Probably no institution in our history has done more to strengthen and sustain American nationality than has the Supreme Court. It has obtained the respect of all nations, and usually it has possessed the confidence of all parties. Its dignity, ability, and impartial fairness have commended it to the people.

<sup>1</sup> Johnston's *History of American Politics*, cited by Hinsdale, *Civil Government*.

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## CHAPTER VII

### THE STATES AND THEIR GOVERNMENT

**Relative Im-  
portance of  
the State in  
the Life of  
the Citizen.** **I**N the American system of government the State is as important as the Nation. So far as the citizen's personal interests are concerned, in all the affairs that directly touch his civic life, the State is even more important than the Nation. While the State does not excite so much interest, nor occupy so large a share of the people's attention as does the Nation; while the affairs of the States, their constitutions, their officers, and the functions of these officers are not so well known, yet in the great multitude of affairs in which civil and criminal laws are of concern to the citizen, the State may touch the citizen a hundred times where the Nation touches him once. It is the State that deals with all the ordinary relations of citizens to one another. Mr. Bryce says:

**State  
Functions.  
Bryce.** "An American may, through a long life, never be reminded of the Federal Government, except when he votes at presidential and congressional elections, buys a package of tobacco bearing the Government stamp, lodges a complaint against the post office, and opens his trunk for a custom house officer on a pier at New York when he returns from a tour in Europe. His direct taxes are paid to officials acting under State laws. The State, or a local authority constituted by State statutes, registers his birth, appoints his guardian, pays for his schooling, gives him a share in the estate of his father deceased, licenses him when he

enters a trade, marries him, divorces him, entertains civil actions against him, declares him a bankrupt, and hangs him for murder. The police that guard his house, the local boards that look after the poor, control highways, impose water rates, manage schools,—all these derive their legal powers from the State alone. In comparison with such a number of functions the Federal Government is but a department for foreign affairs.”

Thus it is seen that in dividing the governmental functions between State and Nation while the Nation gets the highest the State gets the most; so the balance is pretty well preserved. Each State has a constitution of its own. This constitution in every case provides for an Executive, or Governor, a Legislature of two Houses, a Judiciary with a system of civil and criminal procedure. Each provides a system of local self-government in counties, cities, townships, and school districts, with a system of State and local taxation.

The constitutions of the States were mainly derived from the same source. The constitutions of Massachusetts and Virginia furnished models for many of the Western States. The original States derived their constitutions either from old English statutes and principles of law, or from the original charters to the Colonies. The colonial charter was nothing more nor less than a constitution. It was “an instrument of government established by a superior authority creating subordinate law-making and administrative bodies that could not transcend the powers laid down in the instrument creating them.” When the Colony became an independent State, the supreme power that had abided in King and Parliament competent to create a colonial constitution and impose limits on governmental agencies passed to the people of the independent State. The legislature, executive, and courts

State Con-  
stitutions  
Came from  
Colonial  
Charters.

<sup>1</sup> *American Commonwealth*, i., 425, 426.

of the State remained limited as they had been, and the people of the Colony in their primary capacity became the sovereign constitution-making power in the State.<sup>1</sup>

The citizens within the limits of the old Colony were the body politic. They were the State. This body politic had absolute and supreme authority over the citizen within its bounds, in all matters in respect to which he was a subject of government. The new State had as it now retains, absolute control over all local political bodies within its limits, its counties, cities, and townships. It had, and retains, power to remodel city charters and revise city governments; it may reorganize or disorganize its counties and townships, and there is no appeal to any higher authority against its action. In the matter

**Constitutional  
Limitations on  
Legislative  
Power in  
State and  
Nation.**

of limitations on legislative power, the fundamental difference between the United States Constitution and the State constitution lies in this: The States voluntarily deprive themselves of and relinquish to the national legislature the powers which that body may exercise; all other powers are retained to the States. The people of the States have conferred certain legislative powers on the national Congress, denying these to themselves, but retaining all others. But in forming their State constitution the people of a State do not *confer* legislative power on their legislature. From the nature of the sovereign State all the residuary mass of powers abides in the legislature, unless denied. The people *restrict* their State legislature in certain respects, including all the restrictions of the United States Constitution, but in all other respects in which government is competent to act, the legislature of a State is free, sovereign, and supreme. He who asserts the power of a State legislature to pass an act or establish an institution has not to prove it; but he who denies the power must cite the clause of the Con-

<sup>1</sup> See Bryce, vol. i., p. 429.

stitution forbidding it. Barring the specified restrictions of the State and national constitutions the power of a State legislature is like that of the British Parliament: it is plenary and unlimited, and it may legislate for all purposes of civil government and do all things that independent governments may do. In framing a State constitution the people commit to the legislature the whole law-making powers of the State which they do not expressly or impliedly withhold.<sup>1</sup> Of course, all departments of the State government, legislative, executive, and judicial, are limited by the State constitution to their respective spheres and cannot infringe the one upon the other.

The Departments of Government are Separate and Restricted.

The rights of the States are defined partly by their reserved powers, partly by the powers withheld from them by the United States Constitution, partly by the powers conferred on the National Government, partly by the judicial decisions and interpretations of the courts, and partly by the accepted facts of our national history. Whatever these rights may have included in the past, it is certain that they do not include the right of nullification and secession. Nullification was settled by Andrew Jackson; and that a State may not secede was settled as one of the prime results of the Civil War. No State may attempt to coerce another, nor establish diplomatic relations with another State, nor in any way deal with nor act upon another. These powers touching inter-State and foreign relations are conferred on the General Government.

States' Rights Defined.

From what has been said, it will be understood that the State constitutions do not derive their authority from Congress. The States do not receive their powers from the General Government. In Canada the Provinces have only those powers that are conferred upon them by the Constitution of the Dominion, while all other powers are

<sup>1</sup> See Cooley's *Constitutional Limitations*, p. 107; Bryce, vol. i., p. 445.

reserved to the Dominion Parliament.<sup>1</sup> In the States it is just the other way. The powers expressed in the State constitutions are original and inherent, not conferred. Congress does not determine the terms of these instruments. Congress may influence the character of a State constitution by imposing such conditions upon the admission of a State as will lead it to conform its constitution to certain requirements, as was proposed in the case of Missouri, in 1820. But it is doubted whether Congress possesses constitutional authority to do this, and it is a power that is rarely exercised. If conditions were imposed upon an incoming State and the State should subsequently amend its constitution in order to have its own way, Congress would have no remedy against such action by the State, except to deny to the people of the State representation in the two Houses of Congress. The State would still remain in the Union in the exercise of local self-government in the control of all its own domestic laws and institutions, like the other States.

State constitutions are usually adopted by State conventions elected for that purpose. The constitution after being framed by the convention is then, as a rule, submitted to the people of the State for ratification or rejection. If the constitution is rejected at the polls a new constitution is devised by the convention; if ratified, the constitution is proclaimed by the governor, or legislature, appointed to perform that function. Sometimes a new constitution is adopted in a State merely by the constitutional convention without submitting it to the people. This is a departure from the American constitutional usage, and is resorted to usually from fear that the voters under the old constitution will not approve certain proposed features in the new. Under this practice the convention is looked upon as holding

X  
State Powers  
are Original  
and Inherent,  
Not Conferred.

How State  
Constitutions  
are Made.

<sup>1</sup> British North America Act, 1867.



within itself the sovereign and supreme will of the people. This method of constitution-making is resorted to more in the South than elsewhere as a more convenient means of imposing suffrage restrictions. It is, of course, not so democratic as the method of popular ratification.

In the process of amending a State constitution the legislature takes the initiative. The amendment must be made according to the provisions of the existing constitution. These will probably require that the proposed amendment shall pass the legislature by a two-thirds majority, or by a majority in two successive legislatures, and then be submitted to the people for approval. Or, the legislature may call a Constitutional Convention, or ask the people to decide upon the desirability of such a convention for the purpose of revising the whole constitution or of making a new one. When a constitutional amendment is submitted to the people for ratification, however desirable the amendment may be, it is likely to fail of adoption from the indifference and apathy of the voters. If the amendment be submitted at a special election the majority of the voters may not care enough about the matter to come to the polls. If submitted at a general election, many voters will be likely to vote for State and National officers while failing to vote on the amendments; and as the constitution will generally require a majority of all the votes cast to carry an amendment, the amendment may fail merely from the failure of the voters to express themselves upon it.<sup>1</sup>

Constitution-making or amending, by popular vote, is one of the chief forms of the referendum in America. The making of local-option laws on the liquor traffic, and money grants by taxation to aid in building railroads, are other forms of the

Amending  
State  
Constitutions.

State  
Amendments  
are Difficult  
to Secure.

Forms of the  
Referendum  
in the State.

<sup>1</sup> See *The Nation*, Jan. 10, 1902, for failure of Referendum on Amendments.

referendum. By the referendum is meant the provision that laws must be referred to the people before they can be binding. The referendum is generally associated with the *imperative mandate*. This provides that when a certain proportion of the people have petitioned for the enactment of a law, this shall serve as a mandate to the legislature to submit the act to a popular vote. Of course only questions relating to general public policy, and not statutory matter touching private and local law, would be so submitted.

The objection to the referendum is that the people will be too frequently disturbed; that they will not be interested in voting on the proposed laws, as experience has shown in the efforts to amend State constitutions.<sup>1</sup>

Though a State legislature might permit a referendum for its guidance, the legislature itself would have to enact the law unless the constitution of the State be first so amended as to provide for law-making by referendum. It is a maxim of law that delegated power may not be delegated. When the supreme power—the people—have vested law-making in the legislature, it must remain there until the people determine otherwise by a new constitution. “The power to whom this duty has been entrusted cannot relieve itself of responsibility by choosing other agencies upon whom the power shall be devolved.”<sup>2</sup>

The State legislature is bicameral in form. Both Houses are chosen by popular vote, by the same voters, but in electoral districts of different sizes.

*Senatorial districts* are larger than Representative districts; consequently there are fewer Senators.

The *senatorial term* is generally longer. The usual term of a Representative is two years; the senatorial term in most of the States is for four years. The State

<sup>1</sup> See *The Nation*, Jan. 10, 1902.

<sup>2</sup> Cooley, *Constitutional Limitations*, p. 141.

Senate, like the national Senate, is a permanent body; half its number are old members, or "hold-over Senators," who sit in two consecutive legislatures. The eligible age of the Senators is usually higher than that of the Representatives.

The State Senators and Representatives are usually apportioned among the several counties of the State according to population, and the electoral districts are expected to be equal to the number of inhabitants. One of the chief abuses of the "gerrymander" is the making of unequal districts for partisan purposes. In the apportionment the counties are generally recognized as the electoral units, and many State constitutions forbid that counties should be divided in making up electoral districts. In the New England States the towns or townships were generally recognized as the electoral units. In Connecticut and in other of the older States provision was made for the *representation of towns* rather than of numbers of people. New Haven, with one hundred thousand population, had no more representation in the Legislature of Connecticut than a country town of five hundred people. The recent constitution of that State has remedied this defect.

Apportion-  
ment of  
Senators and  
Represent-  
atives.

Representatives and Senators are usually required to live in the districts which they represent. This restriction tends to prevent the securing of the best ability in the State for service in the legislature. The restriction rests on custom rather than on law, but it is all the harder to overcome for that reason. It has been suggested, as a means of meeting this difficulty, that fifteen or twenty Senators be elected from the State at large, to be voted for by all the voters of the State. This, it is thought, would lead to the choice of men of ability and State reputation.

District Resi-  
dence is  
Required.

The members in the State legislatures vary from fifty-two in the whole Legislature of Delaware (nine of these

being in the Senate), to 321 in the House of Representatives in New Hampshire. The pay of members varies from one dollar per day in Rhode Island to fifteen hundred dollars a year in New York. The pay is usually a *per diem* of from four dollars to eight dollars a day and mileage.

*Suffrage* is a subject for State regulation. Who may vote for President or Congressman depends upon the laws of the State. Whoever is entitled by the constitution and laws of the State to vote for members of the most numerous branch of the State legislature may vote in national elections.<sup>1</sup> Voting is not a right of citizenship. It is a privilege conferred by the State on those whom it considers fit. Voters and citizens are not identical. Many citizens are not voters; many voters are not citizens. Women are usually not voters; they are, of course, citizens. While the States cannot make aliens into citizens, they may, and in some cases do, make voters out of them. In Indiana a foreigner is required to live but one year in the State to become a voter; he must live five years in the United States in order to become a naturalized citizen.

Though the regulation of suffrage is left to the States the qualifications are generally uniform. Manhood suffrage prevails, as a rule, throughout all the States. Some restrictions have been imposed lately in the Southern States by requiring certain educational and tax-paying tests. This is done for the purpose of excluding colored voters. The State constitution may require that before one may vote he must be able to read the Constitution or understand a section of it when it is read to him. Election boards composed of white men may decide that illiterate whites understand the Constitution while illiterate blacks do not. A "grandfather clause" also may admit illiterate whites

Suffrage is  
Regulated by  
State Laws.

Educational  
Tests.

The "Grand-  
father Clause."

<sup>1</sup> United States Constitution, Art. i., Sec. 2.

while excluding illiterate blacks, by providing that any one whose father or grandfather was a citizen of the State prior to 1867 (the date of the Fourteenth Amendment) may be relieved from the suffrage tests.

Four of the States<sup>1</sup> admit women to the general suffrage, while several other States allow women to vote on several local matters pertaining to taxation and education.

Formerly, property qualifications were common in most of the States. The growth of the democratic spirit has led to the abandonment of all such qualifications. The small poll-tax, or nominal property tax now required in some of the States does not deter any man twenty-one years of age, however poor, from casting his ballot. The tax is easily taken care of by friends or interested party managers.

The uniformity in suffrage qualifications in the States is due to the general democratic spirit of equality prevailing throughout the Union, and partly to the requirements of the Fourteenth Amendment to the Constitution of the United States. This Amendment provides that representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. But when the right to vote at any election for President or Vice-President or Representatives in Congress is

Suffrage and  
the Fourteenth  
Amendment.

“denied to any of the male inhabitants in any State, being twenty-one years of age and citizens of the United States or in any way abridged except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

This is mandatory and requires that the State's representation at Washington “shall be reduced” if its voters

<sup>1</sup> Wyoming, Colorado, Idaho, and Utah.

are disfranchised for other reasons than crime. This holds out an inducement to the State to preserve a wide suffrage.

The executive department of a State consists of the Governor and minor administrative officers, such as the Lieutenant-Governor, the Secretary of State, the Auditor of State, the Treasurer of State, the Attorney-General, the Superintendent of Public Instruction or the Commissioner of Education, Tax and Benevolent Boards, and other administrative agencies provided for by law and appointed by the Governor, or elected by the legislature.

The subordinate State officers, like the Secretary and Treasurer of State, are elected and hold their offices independent of the Governor. They are in no way related to him like a Cabinet or council of advisers. Their work is not political and their offices do not enable them to determine the public policy of the State. The legislature determines the policy of the State, while each executive officer has his duties defined by law and each is directly responsible to the people. The governors are now elected by a direct vote of the people, while formerly they were frequently elected by the legislature. They hold office from one to four years and receive salaries ranging from one thousand dollars in Michigan to ten thousand dollars in New York.

It is the Governor's duty to see that the laws of the State are faithfully executed; to convene the legislature when occasion requires; to recommend desirable legislation; to make such appointments as the constitution and the laws allow him; to act as commander of the State militia, and in this capacity to repel invasion and suppress riot, rebellion, and insurrection; to grant reprieves and pardons; to issue writs for the election of Congressmen, and to secure by extradition criminals escaping to other States.

The State  
Executive.

The ~~State~~  
Executive  
Officers are  
Not Responsible  
to the  
Governor.  
They are Not  
a Cabinet.

Duties of the  
Governor.

The Governors in all the States but four have the veto power. In some of the States this may be overridden by a bare majority of the legislature, but even in such States the Governor's veto may cause the delay and public exposure of a bad measure and may even defeat it entirely upon its reconsideration. The Governor's reputation depends upon his use of the veto.

Executive  
Veto.

The Governor is not a figure of great political importance, by no means as important as in former days. John Jay resigned the Chief Justiceship of the United States to become Governor of the State of New York, and frequently the governors of the old commonwealths looked upon their office as equal in rank to that of the President. The Governor represents the official dignity of the State on state occasions, and graces public assemblies by his presence and by a suitable address. His patronage is not extensive and his office represents prestige rather than power. This holds good in ordinary times when the Governor's duties are not important, but in times of strikes and riots the character of the Governor becomes of vital concern, and his firmness, wisdom, and executive energy may be most effective in defending and promoting the welfare of the State. To be the governor of one of the leading States sometimes places a man in line for political promotion and may lead to his selection for a Cabinet portfolio or to his nomination for the Presidency or Vice-Presidency.

Political Im-  
portance of  
the Governor.

The Lieutenant-Governor corresponds to the Vice-President. In most of the States he is *ex officio* the presiding officer of the State Senate and in case of the death or disability of the Governor, the Lieutenant-Governor succeeds to the governorship. Otherwise the Lieutenant-Governor has no functions to perform.

Lieutenant-  
Governor.

The impeaching power is provided for in the State constitutions as in that of the United States, and it usually operates after the same fashion.

The removing power is vested either in the Governor or legislature, or in the Governor upon an address of the two Houses of the legislature.

Each State has its judicial system. There are local County and Circuit Courts and a final Court of Appeals or Supreme Court. There is in some States **The State Judiciary.** an intermediate Appellate Court for the disposition of certain cases on appeal. In earlier days the judges were generally appointive by the governors. Through the growth of the democratic spirit, notable in America from 1815 to 1860, the constitutions formed in that period took the appointment of the judges from the governors and made the judicial office elective by the people. The judges are now elective in thirty-one States.

The judicial tenure in the States has also become more democratic. Formerly the tenure was for life or during **Judicial Tenures.** good behavior. Judges could be removed only when condemned on impeachment, or upon an address requesting their removal presented by both Houses of the legislature. It is in this latter way that the judges are still removable in a majority of the American States. This also is the process of judicial removal in England. In the States a two-thirds vote of the two Houses is usually required. The terms of the judges now vary in the States from twenty-one years in Pennsylvania to two years in Vermont, averaging about eight years.

The judges' salaries are usually low, on an average about four thousand or five thousand dollars. They **Judicial Salaries.** range from \$2000 in the State of Oregon to \$17,500 in the State of New York. Such low pay will make it impossible to secure for the bench first-rate legal ability, or it will tempt the judge to seek to supplement his salary by other and questionable means. It is frequently asserted that popular elections, short terms, and low salaries have had a very positive tendency



to lower the character of the State judiciary; that popular elections have thrown the choice of judges into the hands of political wire-pullers, and have led to the use of judicial places for party purposes; that short terms compel the judge to keep on good terms with the political manipulators, and he cannot, therefore, administer the law without fear or favor; that small salaries prevent leading lawyers from offering themselves for judicial office, when the office promises not one tenth the pay that they can make in their practice; and that the consequence of all these influences is that the judges in many States are much inferior to the lawyers who practise before them.

But it is generally not true that the most astute and money-making lawyer would make the best judge, and in most of the States good men can be induced to take the judicial offices at a fair salary. Upon their transfer to the bench they administer their office without reference to politics, and they prove to be judges incorruptible and above reproach. No doubt political influences do in a measure affect the conduct of some of the judges of the county and circuit courts, but this detracts from rather than adds to their popularity with the people, and if the fact be generally recognized it may decrease rather than increase the judge's chance for renomination and reelection. Popular election, too, may have its compensating advantages, in restraining autocratic and political conduct on the part of the judge.

The State courts have the same power to declare acts unconstitutional, and therefore null and void, that the national courts have. State judges are sworn to support both the Constitution of the State and of the United States and they may declare an act of Congress unconstitutional. Such decision is not final, of course, for it is subject to review in a national court. It may be reversed, but it may also be

Effects of  
Popular Election and Short Terms.

State Judges  
Pass on the  
Constitutionality of Acts

confirmed. It may be not only the right but the duty of a State judge to declare a congressional act unconstitutional that may be called into litigation before him. It is, however, the special function of a State court to expound the State constitution, and if an act of the State legislature be not in harmony therewith it is the court's duty so to declare. As in the United States courts, the State judges pass on constitutional questions only as cases arise in suits at law. This may cause great delay in determining officially the validity of a statute, and some States, in order to meet this difficulty, require the Supreme Courts to deliver an opinion on the constitutionality of an act immediately upon its passage, or as a condition to its passage. Such opinions, however, cannot have the same weight nor binding effect as a final official decision following litigation, and a judge may not be bound in his final decision on a case by his previously expressed opinions. In the later decision of the case the judge may be influenced by the practical working of the act in experience and by the able arguments of capable attorneys in the case in which the act is involved.

Citizenship, like suffrage, is chiefly a State matter. There was no clear nor generally accepted definition of Citizenship a American citizenship until after the Civil War, State Matter, when the Fourteenth Amendment declared: Subject to the "All persons born or naturalized in the United Fourteenth Amendment. States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

This amendment recognizes two separate citizenships: a citizenship of the States and a citizenship of the United States, and it makes State citizenship derivative from national citizenship. The prevailing view formerly was that national citizenship was dependent on and derived from State citizenship; that one could become a citizen of the United States only as a consequence of being a

citizen of some State or Territory of the Union; that State citizenship was the primary fact while National citizenship was only secondary and consequential. Calhoun gave clear expression to this view :

“ A citizen at large, one whose citizenship extends to the entire geographical limits of the country, without having a local citizenship in some State or Territory, a sort of citizen of the world, would be a nondescript;—not an individual of such description can be found in the whole mass of our population. Every citizen is a citizen of some State or Territory, and as such, under an express provision of the Constitution, is entitled to all the privileges and immunities of citizens in the several States; and it is in this and in no other sense that we are citizens of the United States.”<sup>1</sup>

This was the State rights' view. It received judicial sanction in the Dred Scott decision. Each citizenship, State and national, had its separate privileges and immunities. While all national citizens must first be State citizens it did not follow accord-  
The Dred  
Scott Decision  
on Citizen-  
ship.

ing to this view that State citizenship necessarily carried with it the privileges of national citizenship. This was one of the main points at issue in the Dred Scott case. Was Dred Scott a citizen of the United States, entitled to sue in the national courts? Could one of African descent and slave birth become a citizen of the United States merely by his being made a  
May a State  
Make a Man a  
Citizen of the  
United States ?

citizen of one of the States? The Supreme Court in the Dred Scott case denied the privileges of national citizenship to negroes. The fact that they had been made citizens in some of the States did not work their national citizenship. Chief Justice Taney asserted that the rights of citizenship which a State may confer within its own limits should not be confounded with the rights of citizenship as a

<sup>1</sup> Calhoun's speech on "The Force Bill," *Works*, vol. ii., p. 242.

member of the Union. One may have all the rights and privileges of a citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State, or to the rights of United States citizenship. Each State may confer its civic rights and privileges upon an alien or on any one it thinks proper, but these rights will be restricted to the State which gave them. No State since the adoption of the Constitution can, by naturalizing an alien, invest him with the rights and privileges of Federal citizenship. The black man could not be made a citizen of the United States through the action of a single or of several States; it had to be done, if done at all, through the Constitution. The dissenting opinion of Justice Cur-

**Curtis's Dis-  
sent in the  
Dred Scott  
Case.**

tis agreed in the view that each State was free to determine for itself what persons born or naturalized within its limits should be citizens of such State. It differed in asserting that State citizenship resulted in National citizenship. If the negro were made a citizen in any State he thereby became a citizen of the nation with all the privileges of Federal citizenship. Both Taney and Curtis held that citizenship of the United States was dependent upon and proceeded from citizenship of the State; the difference was as to the power of the State to invest persons, like negroes, not generally conceded the rights of citizenship, with the citizenship of the United States. Taney denied that National citizenship was a necessary consequence of State citizenship.

The Fourteenth Amendment has removed all ground of dispute and doubt. It tells who are citizens of the United States and of the States wherein they reside,—“All persons born or naturalized in the United States and subject to the jurisdiction thereof.” The Fourteenth Amendment then goes on to say, “Nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any

## The States and their Government 359

person within its jurisdiction the equal protection of the laws."

Before the Civil War the fundamental civil rights of the citizen were exclusively within the control and protection of the States. Were they now to come for review within the operation of the United States courts? Were civil rights nationalized? In saying that no State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States the Fourteenth Amendment did not intend to transfer the security and protection of all the fundamental civil rights of the citizen from the States to the Federal Government. The powers of the National Government over civil rights were not increased. Of the two citizenships—State and

**The Protection of the Citizen in his Civil Rights still a State Function.**

National—the amendment recognized that each had its corresponding and different privileges and immunities. What were the privileges and immunities of State citizenship? Those which are fundamental, which touch the national and inalienable rights of all citizens,—the right to life, liberty, and property, the rights which have at all times been enjoyed by citizens of the several States anterior to all their constitutions, State or National, and which these constitutions were designed to protect and secure. The protection of these rights was not transferred by the war amendments to the Congress of the United States. If Congress had to supervise and guard these rights, it might pass laws in advance limiting and restricting the exercise of legislative power by the State. "Such

a construction would constitute this court a perpetual censor upon all legislation of the States, on the civil rights of their own citizens, with authority to nullify such as it did not approve. The effect would be to fetter and degrade the State governments by subjecting them to the control of Congress, to change radically the

**The Supreme Court on Citizenship and the Fourteenth Amendment, in the Slaughter-House Cases.**

whole theory of the relations of the State and Federal Governments to each other and of both these governments to the people.<sup>1</sup>

What are the privileges and immunities of the citizen of the United States which the States are forbidden to abridge? Those which are within the sphere of the United States Government.

Free access to the seat of government, to share its offices, to administer its functions.

Free access to its ports, subtreasuries, land offices, and courts.

Protection to life, liberty, and property on the high seas and in foreign countries, through diplomatic agencies.

To peaceably assemble and petition for redress of grievances.

The writ of *habeas corpus*.

To use the navigable waters of the United States.

To become a citizen of any one of the States by a *bona fide* residence therein.<sup>2</sup>

One born in the United States and subject to its laws is a citizen of the United States and of the State where he lives. Those naturalized by the laws of the United States are national citizens and citizens of their respective States. If a citizen of one State moves to another, he becomes by that act a citizen of the new State. He does not carry with him the privileges and immunities conferred by the former State, but the new State must allow him all the rights and privileges it allows its own citizens. A citizen of a State is always, or is soon to be, a citizen of the United States, but a person may be a citizen of the United States without being a citizen of one of the States, as he may have his residence in Washington City or in the Territories.

<sup>1</sup> Chief Justice Chase, United States Supreme Court decision in the Slaughter-House cases.

<sup>2</sup> The Supreme Court in the Slaughter-House cases.

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Thus we see the State is still the guardian of the fundamental civil rights of the citizen, as well as the determiner in the largest extent of the citizen's political privileges. In the American system the State is an ancient and honorable body politic, and its legitimate rights and privileges will continue to be jealously and carefully guarded by all parties in the State.

## CHAPTER VIII

### THE TERRITORIES AND THEIR GOVERNMENT

**T**HE Territories of the United States may be grouped as follows:

1. Three Organized Territories :	Area in Sq. Miles.
Arizona.....	113,020
New Mexico.....	122,580
Oklahoma.....	39,030
2. Two Unorganized Territories :	
Alaska.....	531,000
Indian Territory.....	31,400
3. The District of Columbia.....	60
4. The Island Possessions :	
Hawaiian Islands.....	6,640
Porto Rico.....	3,600
The Philippines.....	115,300

The *Organized Territories* have a form of government provided for them by Congress. Congress has extended to them the provisions and guarantees of the Constitution. Therefore the fundamental law for their government may be said to consist of (a) the United States Constitution and (b) the Organizing Act of Congress.

The act of Congress by which a Territory is organized bears to the people of a Territory the relation that a State constitution bears to the people of a State. This fundamental law, however, was not ordained or adopted by the inhabitants of a Territory, nor is it within their control. It was created

4. The Organizing Act for a Territory.



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by Congress, and it may be amended or repealed by Congress. Its importance consists in that it defines the limits of the Territory and prescribes the forms, rules, and principles for the conduct of its government. It therefore partakes of the nature of a constitution. The famous Ordinance of 1787 was the forerunner of all these organizing acts. That Ordinance was a great <sup>The Ordinance</sup> and worthy constitution for the Territories for <sup>of 1787.</sup> which it was made, and to originate its provisions required legal ability and constitutional statesmanship of a high order. This great Organizing Act became famous for several reasons:

1. It gave a form of government to the Northwest Territory that became a precedent for time to come.
2. It guaranteed to the Territory *free soil*.

“Neither slavery nor involuntary servitude, except in punishment of crime whereof the party shall have been duly convicted, shall ever exist in said territory.”

3. It guaranteed *free religion*.

“No person demeaning himself in an orderly manner shall ever be disturbed or molested on account of his mode of worship or religious belief.”

4. It guaranteed *free schools*.

“Religion, morality, and knowledge being essential to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.”

5. It guaranteed *civil liberty*.

The rights guaranteed in the Virginia Constitutional Bill of Rights of 1776 and in the Massachusetts Constitution of 1780, coming from the old “English Bill of Rights” of 1688, were incorporated in this great Territorial Act. Free speech, a free press, free assembly, free

petition, free trial by a jury of his peers, the *habeas corpus*,—to all these common rights of the freemen every inhabitant of the Northwest Territory was to be guaranteed.

These wise and beneficent provisions of the Ordinance of 1787 have been, in the main, transplanted to our new Territories as these have been from time to time organized for civil government by the Congress of the United States. While these great guarantees were not secured in law by the Ordinance of 1787 except as they were afterwards incorporated in the constitutions and laws of the States subsequently erected in this territory, the Ordinance did much to determine the character of the people who settled in the Northwest, and was an effectual influence in committing those States to freedom and free institutions.

The later organizing acts have, as a rule, attracted very little attention in our history, though they are of the utmost importance both from the point of view of their subject-matter and from the interests of the people for whom they provided their first and original civil government.

In organizing the Territories, Congress has always had in view the admission of the Territories as States of the Union. This was the original purpose in the **The Territory Looks Forward** first acquisition of territory, even before the **to Statehood.** adoption of the Constitution. In the Treaty of 1782, by which our independence was recognized, in addition to the original thirteen States the territory west of the Alleghany Mountains, east of the Mississippi, south of the Great Lakes, and north of the thirty-first degree of north latitude, was recognized as belonging to the Confederate States. But this territory belonged to certain States, not to the United States. Maryland refused to ratify the old Articles of Confederation until guarantees were given that this territory would be ceded to the General Government. In the famous Resolution of 1780,

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by which the old Continental Congress sought to induce the claimant States (Massachusetts, Virginia, New York, Connecticut), to cede to the General Government the territory which they claimed in the West, Congress said:

“The lands which may be ceded to the United States by any particular State shall be disposed of for the common benefit of the United States and be settled and formed into distinct republican States, which shall become members of the Federal Union and have the same rights of sovereignty, freedom, and independence as the other States.”

In all the territory since acquired by treaty, save that of Alaska and the islands lately acquired from Spain, it was agreed that the territory so acquired should be incorporated into the Union as soon as possible, and that in the meantime the civil rights of the inhabitants should be guaranteed. This was the case with Louisiana in 1803, with Florida in 1819, and with the Mexican cessions in 1848, and the Alaskan Treaty guaranteed the rights of citizenship to the inhabitants of the transferred territory.

The Government of an organized Territory <sup>Territorial</sup> has usually provided for three departments<sup>1</sup>: <sup>Government.</sup>

1. Executive; 2. Legislative; 3. Judicial.

1. The executive consists of a Governor and other officers appointed for four years by the President of the United States, confirmed by the Senate. The <sup>The Executive.</sup> Governor performs the ordinary executive duties, to see that the laws of the United States and of the Territory are faithfully executed. He generally has a veto on legislative acts, which may be overridden by a two-thirds vote of each House.

The other executive officers of the Territory, the Secretary, Treasurer, Auditor, and Superintendent of Public

<sup>1</sup> This description applies to the customary governments in the organized Territories in the western part of the United States. The Governments for Porto Rico and the Philippines are separately described. See pp. 374, 376.

Instruction, are also appointed by the President and confirmed by the Senate, and, like the Governor, are subject to the President's removal.

2. The legislature is composed of two Houses, a Senate of twenty-four persons, and a House of sixty-two persons.<sup>1</sup> Each House is elected by the voters of the Territory for a term of two years, and the legislature sits but once in that period. The legislative sessions are limited to sixty days and the salary of a member is four dollars a day. The Houses work by the *Committee System*.

The suffrage is regulated by law made in the Territory, but Federal law requires that each member of the Territorial legislature shall reside in the district which he represents.

The legislative power of every Territory is as extensive as that of a State,—extending “to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States.” This includes, of course, the organizing act creating the Territory. “No law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on the property of the United States, nor shall the land or other property of non-residents be taxed higher than the lands or other property of residents.”<sup>2</sup> The legislative power of the Territories is also limited by the important right of Congress to modify or annul at any time any Territorial law. In the organization of some Territories the organizing acts have directed that all Territorial acts be submitted to Congress—to be of no effect if disapproved. This over-control of Congress is not usually exercised.

3. The judiciary consists of three or more judges of a Supreme Court, appointed for four years by the President with the consent of the Senate, together with a United

<sup>1</sup> Oklahoma has thirteen in the Upper House and twenty-six in the Lower.

<sup>2</sup> United States Statutes, 1878.

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States District Attorney and a United States Marshal. The salary of the judges is three thousand dollars. These officers administer both the Federal and local law. The Territorial courts are not a part of the Territorial Judiciary. The Territorial courts are not a part of the Federal Judiciary; the Territorial legislature regulates their practice and procedure. The Judiciary of a Territory, like its legislature, has always been established by a law of Congress. They are legislative courts purely; they are not constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. It has been held that a judge of the District Court of Alaska was not a judge contemplated by the Constitution and was subject to removal by the President.<sup>1</sup> If he were a constitutional, not a legislative, judge, his tenure would, of course, be during good behavior.

The Territories do not take part in presidential elections, nor do they send Senators to Congress. They do not take part in governing the United States. Each Territory may send a delegate to Congress, and he is allowed a seat, and he may speak, introduce measures, and make motions, but he may not vote. The right of a vote in Congress depends on the Constitution, and that right is conferred upon States, not upon Territories.

A Territory is a State in the making. It is organized with the purpose of making it into a State. When the Territory has a population equal to that of the average congressional district the presumption is in favor of its statehood, and it should be, and will be likely to be, admitted unless there are specific objections. A Territory may be kept out for a while for special public reasons, as in the case of Missouri on account of slavery, and of Utah, later, on account of polygamy. Utah's admission was postponed long after it had sufficient population. A Territory may be kept out for party reasons, as lately

<sup>1</sup> *McAllister vs. United States*, 141 United States, 174.

in the case of Oklahoma, whose silver complexion was objectionable while the silver issue was prominent; or a Territory may be brought in for special party and political reasons, as in the case of Nevada, which was admitted as a State (1864), when its population was only about twenty thousand, for the sake of getting its vote in favor of the Thirteenth Amendment. Congress has absolute discretion and power in the matter and may admit or refuse to admit as it pleases. Congress is bound in the matter only by its sense of justice and fair play, by the principles and practices of the past, and by public opinion.

*"New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor shall any State be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned, as well as of the Congress."*<sup>1</sup>

How is a Territory made into a State? How do Territories pass into statehood?

When a Territory has a population equal to that of an average congressional district, its legislature will "memorialize," or petition, Congress to pass what is called an "Enabling Act" for the Territory.

If Congress is favorably disposed to the request it passes such an act. This act is to "enable," or authorize the people of the Territory to form a State constitution. The act will either provide for a Territorial constitutional convention, or it will authorize the Territorial legislature to provide for one. The Enabling Act.

Enabling Act may also prescribe conditions to be fulfilled by the new constitution. In accordance with the law of Congress or of the Territorial legislature, the people of the Territory elect delegates to a constitu-

<sup>1</sup> Art. IV., Sec. 3, Cl. 1.

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tional convention, this body frames a constitution, and submits it to the voters of the Territory. If adopted by the voters, it is then submitted for the approval of Congress and if the constitution is accepted by that body, if the new State constitution provides for a Republican form of government and the conditions suggested by Congress are complied with, the State is declared a member of the Union by a formal resolution, and Representatives are apportioned to the new State. The Territory has then entered fully into the enjoyment of self-government on an equal footing with all the other States, and the National Government has no further power to interfere in its "domestic concerns." While the process described above is the usual one for making a State out of a Territory, it has frequently happened that the Territory has not awaited an "Enabling Act" of Congress, but it has itself taken the initiative in calling a constitutional convention in the Territory. With the constitution already in hand the Territory applies to Congress for admission. This is true of States formed by the division of other States, as in the case of Maine, Kentucky, and West Virginia, and it was likewise the experience of Michigan and California, on account of local conditions.

It was formerly contended that a new incoming State should be left free to make its own constitution in its own way; that, while Congress could admit or refuse to admit, yet if it chose to admit it must admit into a union of equal States, and to impose conditions on an incoming State was unconstitutional. This was the constitutional question involved in the discussion over the admission of Missouri. Conditions not imposed on the original States could not be imposed on new States. As between the States and the Central Government all powers were distributed by the Constitution. For Congress to assume to redistribute these powers,—to say that a new State should

Imposing  
Conditions on  
a New State.

be limited in a way that the Constitution did not say, —was to assume a sovereignty that did not belong to it, that would turn our Federal into a centralized system.<sup>1</sup> But late Enabling Acts have required the Territorial conventions to make “by ordinance irrevocable without the consent of the United States and the people of the United States, provisions for perfect religious toleration and for the maintenance of public schools free from sectarian control; and that polygamous or plural marriages are forever prohibited.”<sup>2</sup> No such conditions were imposed on the original States.

Whether such conditions are inviolable, and whether a new State, when it is once safely in the Union, may repeal these ordinances which it has been required to pass, and disregard the conditions of its admission, are academic questions which have been considerably discussed, but they have not yet had practical application in experience.

While Congress has never attempted to interfere with the States in making whatever alterations of their constitutions the States see fit, such an act on the part of a new State would be a serious breach of faith. The people of the United States would have it in their power to punish such a disregard of obligations by shutting the doors of the Senate and House of Representatives against the Representatives elected by the people of the offending State, and by denying them “a voice in the councils of the nation because they had acted in bad faith and violated their solemn agreement by which they succeeded in getting themselves into the condition of a State.”<sup>3</sup>

Our political theory regards all citizens as equal, and

<sup>1</sup> See Pinkney's speech on admission of Missouri, Von Holst's *Constitutional History of the United States*, vol. i.; Burgess's *Middle Period*, pp. 86-87.

<sup>2</sup> Enabling Act for Utah.

<sup>3</sup> Brief of Judge Jeremiah M. Wilson, in advocating the admission of Utah, 1887.



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as equally entitled to a voice in their government, and in the days of 1776 we asserted that there must be "no taxation without representation." But the people of a Territory are taxed by national laws in the making of which they have no voice. They may be governed entirely without their consent. While in a Territorial condition the people of a Territory can have no voice in determining their own fundamental law. The only way in which they can have any voice in their government is through the organization and usages of the national political parties. The Territorial people are under the absolute governing control of Congress. The only way in which they can come into self-government, so that American principles can be applied to them, is by the process of statehood, or by a liberal Organizing Act, by which Congress consents to leave to them a large measure of self-government. It is by this means and by the fact that it has always been our policy and intention to admit the Territories to statehood as soon as practicable and safe, that we "save our face" in our profession of adherence to "taxation by representation" and "government by consent."

The Territories and Taxation without Representation.

Alaska and the Indian Territory represent the "Unorganized Continental Territories." They are not allowed local self-government, but are governed from Washington, somewhat like Crown Colonies of Great Britain.

Unorganized Continental Territories.

The civilized tribes of Indians in the Indian Territory have maintained local governments of their own, with elective legislatures and executive officers; but it was intended that the functions of these governments should be limited to the Indians, an arrangement secured by treaties with the tribes, in which each Indian nation is treated by our Government as a tribal whole. Each tribe was looked upon as capable

Government of the Indian Territory.

of managing its own affairs and governing itself: Our treaties have regarded the Indians, each tribe for itself, as distinct, independent political communities, capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. But an Indian tribe occupying land within the jurisdiction of the United States is not a "foreign State." They are "domestic, dependent nations." They occupy a territory to which we assert a "title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."<sup>1</sup>

Domestic,  
Dependent  
Nations.

Under this "state of pupilage," our Indian treaties placed the Indians under the protection of the United States, admitted the supremacy of the United States, provided for its interference in certain cases, recognized the Indians' right to their lands of described boundaries, made certain provisions for their needs, and gave to the United States the right to regulate their trade.

This tribal relation, this wardship and state of pupilage, is now being broken up. Under it there has been no uniform government for the Indian Territory. Oklahoma was set off with a separate Territorial government in 1890. The whites, by lease from the Indians and by bribery and fraud or intermarriage, obtained citizenship and ownership of land within the Indian nations, until finally the whites far outnumbered the Indians. In 1898, Congress decided to change entirely the basis of government for the Indian Territory and to this end adopted a code of laws for the Territory.

Disappearance  
of the Tribal  
Relations.

<sup>1</sup> Chief Justice Marshall, in *Cherokee Nation vs. Georgia*, 1831, 5 Peters, 1.

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United States courts were established within the Indian Territory, and the legislation of the tribes was subject to approval by the President. Provision is made for the allotment of land in severalty under United States control and for the early and entire cessation of Indian government. In proper time the usual Territorial government will be provided.

*Alaska*, purchased from Russia in 1867, has an area of 531,000 square miles, with a population of 44,000. Congress, by Act of June 6, 1900, provided a civil *Alaska and its* code for Alaska. The executive power is vested *Government.* in a governor appointed by the President, with the consent of the Senate, for four years. The Surveyor-General, who is *ex-officio* Secretary, United States Attorneys, Judges, and other responsible officers are also to be appointed by the President. A District Court is established, having general jurisdiction over civil, criminal, equity, and admiralty cases, and for the settlement of mining disputes. Appeals may be taken from this court to the United States Supreme Court if constitutional questions are involved; in other cases appeals are carried to the United States Circuit Court. Three judges are appointed who are authorized to appoint Commissioners throughout Alaska, who are to act as justices of the peace, recorders, and so forth. Provisions are also made for appointment of marshals and deputies for carrying out the orders of the Judges and Commissioners. There is no provision for a general legislative body: Congress acts in that capacity. Local self-government is provided for in towns of three hundred inhabitants by their incorporation.

Officially, the term "Insular Possessions" is used to include the Philippines, our Samoan Islands, Guam, and other minor islands in the western Pacific that belong to the United States. Porto Rico, as it *The Insular Possessions.*

is also under the absolute government of Congress, may be included in this description.

The *Samoa Islands* were formerly under the government jointly of Great Britain, Germany, and the United States. In 1900, this arrangement was terminated by a treaty, and we obtained absolute ownership of three of the Samoan Islands, the most important being Tutuila. A military government was established there.

*Porto Rico* came under the jurisdiction of the United States by the Treaty of Paris with Spain in 1898. The island has an area of about 3,600 square miles, and a population of about 953,000. Civil government for Porto Rico along the lines of that for our Organized Territories was provided in the so-called Foraker Act, passed by Congress April 12, 1900. This act established ports in the island, provided a system of education, established the authority of the United States District Courts, provided for a revenue system and internal improvements and organized a local Territorial government.

The governmental system provides (1) a Chief Executive who is appointed by the President, with a term of four years at a salary of \$8000 a year. (2) An Executive Council of eleven members, also appointed by the President, consisting of a Secretary, Attorney-General, Treasurer, Auditor, Commissioner of Education, Commissioner of the Interior, and five others. Five of the Council are to be native Porto Ricans, and all are to hold office for four years. (3) A Lower House of legislation, consisting of thirty-five members elected every two years by the voters. The Judiciary consists of a Supreme Court and a District Court of the United States for Porto Rico.

This government, of course, is subject at any time to change by Congress, the latter body exercising sovereign and absolute control over the Island. The Island is al-

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lowed a resident commissioner at Washington, whose duty it is to look after the interests of the Island in Congress. This officer is not like the delegates from the other Territories, as he has no seat in Congress, but he has, rather, diplomatic relations with the President. The previous subjects of Spain in the island are declared to be citizens of Porto Rico (not of the United States), and are entitled to the protection of the United States except those who choose to retain their allegiance to Spain.

The *Sulu Islands* in the Philippine group were never actually under Spanish rule. A treaty was made between the Sultan of Sulu and the United States in August, 1899. American sovereignty was acknowledged and its protection against all foreign powers was extended over the islands. The Sulu government of the Sultan was not interfered with, the Sultan and his officers receiving salaries from our Government. It was provided that the United States may occupy and control such points in the islands as its interests may demand. The native institutions of slavery and polygamy were not interfered with, though any slave was given the opportunity to purchase his freedom.

The Constitution of the United States says:

"Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall be duly convicted, shall exist within the United States or any place subject to their jurisdiction." <sup>Slavery among the Sulus.</sup> <sup>1</sup>

No treaty law can be higher than the law of the Constitution, and it is therefore doubted whether the arrangement made by our military authorities with the Sulu Sultan can be sustained by Congress under any civil administration.

<sup>1</sup> Thirteenth Amendment.

The *Philippines*, like Porto Rico, came under the jurisdiction of the United States by the Treaty of Paris, 1898.

**The Philippines.** This treaty was signed by the joint commissioners at Paris, December 10, 1898, ratified by the United States February 6, 1899, declared to be in effect, April 11, 1899. During these negotiations, and until Congress should erect a civil government for the Philippines, the government was a military government under the President as Commander-in-Chief of the military and naval forces. The President appointed General Otis as Military Governor of the Islands, and a special commission of five members, with President Schurman, of Cornell University, at its head, to investigate the condition of affairs in the islands. Early in 1900 a new Philippine Commission of five members was appointed, with Judge William H. Taft at its head, who went to the Philippines for the purpose of establishing civil government there, when this was authorized, and so far as conditions would permit, and as the Military Governor or the President might direct. Some question arose as to whether the Civil Governor or the Military Governor should control. The Civil Government proceeded to proclaim amnesty to all in insurrection against the United States, and municipal and provincial governments were erected in certain cities and provinces under the authority of the Commission. The Fifty-sixth Congress adjourned (March, 1901) without providing a permanent civil government for the Philippines, but provided, instead, that all powers "for the establishment of civil government and for protecting the inhabitants of said islands in the enjoyment of their liberties, property, and religion should be vested in such persons and exercised in such manner as the President should direct." Reports of this temporary government are to be made to Congress. The Act of 1902 for the government of the Philippines, following the re-

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port of the Philippine Commission, provides that after January 1, 1904, the executive power shall be vested in a Governor and a Cabinet of six heads of Departments, a Secretary, an Attorney-General, a Treasurer, an Auditor, a Commissioner of the Interior, and a Commissioner of Education, all required to reside in the Philippines, appointable and removable by the President. They may or may not be natives, but no person holding any civil or military office under the United States is eligible to appointment in this Cabinet. The Governor and his Cabinet, with five native inhabitants of the Philippines, also appointed by the President, constitute a Council. The political functions of this Council are those of an upper House. The Lower House, or House of Delegates, consists of thirty members, elected biennially by the people. A voter for the House of Delegates must be twenty-one years of age, able to read or write either Spanish or English, or possess taxable property, real or personal, situated in the Philippines, and must have resided in the Philippines for one year next preceding the election. All legislative functions are exercised by the concurrent action of these two Houses, the one appointed by the President, the other elected by the people. The Governor is to have a salary of fifteen thousand dollars, a Cabinet member of ten thousand dollars per year. The delegates are to have five dollars a day, and the salaries of the native members of the Council are to be fixed by the Philippine legislature. The provisions for the protection of religious freedom, property, and personal rights, are the same as in our own Constitution, but there are no specific provisions guaranteeing freedom of speech, freedom of the press, freedom of assembly, the right to bear arms, or trial by jury.

It will be seen that there must be concurrent agreement between the provincial and the national judgment (represented by the appointees of the President) before legisla-

tion can be secured. However, "in case of the failure of the legislature during the three months of its regular session to vote the necessary supplies for the carrying on of the government, then the right and authority to vote such supplies is hereby vested in the Council." Thus, as will be seen, the acts providing government for Porto Rico and the Philippines are along essentially the same lines.

The Philippine Act, which may be called the constitution for the Philippines, provides a "Bill of Rights" guaranteeing civil and religious liberty; and it provides that two years after the census is completed, the law-making power may be vested in a legislature of two houses, the Philippine Commission and the Philippine Assembly.

Since the acquisition of the Spanish islands five judges of the Supreme Court, constituting a majority of the Court, though not the same five in each case, have agreed to the following as constitutional law:

1. After a territory has been acquired by conquest or purchase by the United States it ceases to be foreign territory and the tariff laws applicable to imports from foreign countries no longer apply.<sup>1</sup>

2. While it is under military government, the military authority may establish a system of taxation, and such system of taxation can be constitutionally enforced. It may assess duties on goods brought from New York to Porto Rico, though in another decision this trade is declared to be coastwise.<sup>2</sup> This power comes within the "war powers" of the President. But this war power to exact duties upon imports from the United States ceases upon ratification of the treaty.<sup>3</sup>

<sup>1</sup> De Lima *vs.* Bidwell, 182 U. S., 1.

<sup>2</sup> Huis *vs.* New York and Porto Rican Steamship Company.

<sup>3</sup> Dooley *vs.* United States.



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3. Such territory is not an integral part of the United States, but a possession of the United States: it cannot be made a part of the United States by the treaty-making power,—*i. e.*, by President and Senate,—but can be made so only by some act of Congress which explicitly or by necessary implication incorporates it into the United States.

The Islands  
Are a Possession,  
Not an  
Integral Part  
of the United  
States.

The treaty-making, or the war power may *acquire*, but cannot *incorporate*, new territory into the United States. The treaty power may convert foreign territory into domestic territory, but the power to bring this territory into the *corporation* known as the United States is in the representatives of the people in Congress.<sup>1</sup>

By the first decision it is agreed that the treaty and war powers of the Government may convert foreign into domestic territory. No act of Congress is necessary.<sup>2</sup> In the fall of 1899, a firm of importers protested against paying duties on Porto Rico sugars, and they sued the Collector of the Port of New York (Bidwell) to recover back the duties paid under protest. The importation occurred after the ratification of the treaty with Spain ceding Porto Rico, but before the passage of the Foraker Act providing a civil government for the island. The duties were collected under the Dingley Law of 1897, enacted before the beginning of the Spanish War, which authorized the imposition of duties "on goods imported from a foreign country." In another case, a soldier by the name of Pepke, returning from the Philippines after the treaty of peace with Spain, but before Congress had passed an act of civil government for the Philippines, or any act regulating the tariff rates between those islands and the States, brought with him a number of diamond rings. These were taken from him by the custom-house officers

<sup>1</sup> See the opinion of Justice White on this point.

<sup>2</sup> See *De Lima vs. Bidwell*, May 27, 1901, and the *Pepke* case, or the "Diamond Rings" case, December, 1901.

because he had paid no duty on them. Pepke sued for recovery. In this suit for recovery the question was whether these rings were imported from a "foreign country." In both these cases the Court held that by the fact of cession Porto Rico and the Philippines ceased to be foreign territory. A foreign country is one exclusively within the sovereignty of a foreign nation and without the sovereignty of the United States. A district *ceded to and in the possession of the United States* does not remain for any purpose a foreign country. Both of these conditions must exist to produce a change of nationality for revenue purposes. Possession alone is not sufficient; nor is a treaty of cession sufficient without a surrender of possession. But when both conditions exist the district ceases to be foreign and becomes domestic. A country cannot be foreign for one purpose and domestic for another. The country does not remain foreign with respect to the tariff laws until Congress has acted embracing it within the customs union. Therefore no act of Congress is necessary to make foreign territory into domestic territory. According to this decision, when the Treasury Department proceeded to collect the same duties that had been collectible before the cession it acted unconstitutionally and illegally.

The principle here decided is not very important, for it has to do with a temporary condition only, though this condition may recur frequently. A more permanent and fundamental question relates to the power of Congress over the ceded territory.

The Constitutional Powers of Congress in the Island Possessions.

*Is Congress restrained in its government of the ceded Territories by the limitations of the Constitution?*

This has been the most prominent question in American law and politics in recent years. As a question of constitutional law it has been but recently passed upon by the Supreme Court in what are generally known

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as the Insular cases, but as a question of statesmanship and public policy it is by no means a recent question. It came up in our first acquisition of foreign territory by the Louisiana Purchase. The Louisiana Purchase was objected to as unconstitutional for three reasons:

1. The Constitution conferred upon Congress no power to acquire territory.

2. But if Congress could acquire territory, neither conquest nor purchase could incorporate the new territory in the Union, as the Louisiana Treaty guaranteed to do. It must remain in the condition of a colony until it is admitted, not by the treaty power, but by the same confederated powers, the States, that had made the Union and the Constitution, each State consenting.

Constitutional  
Objections to  
the Louisiana  
Purchase.

3. The treaty provided that the ships of France and Spain be admitted for twelve years into the ports of the ceded territory without paying higher duties than the ships of the United States. This, it was asserted, was in opposition to the clauses of the Constitution which declare that "no preference shall be given to the ports of one State over those of another, and that all duties, excises, and imposts shall be uniform throughout the United States."

It was replied, in the first place, that the right to acquire territory must exist somewhere: it is essential to independent sovereignty. As it was prohibited to the States, the power was necessarily vested in the United States. It was involved in the treaty and war powers and belonged to all independent governments. Powers inherent in sovereignty which had not been expressly reserved to the States were vested in the National Government. This view as to the power of the National Government to acquire territory by conquest or purchase is now universally accepted, and the power is now unquestioned. In powers that pertain to

Constitutional  
Defence of the  
Purchase.

a nation the United States may do what any nation may do.

The second objection was evaded in the recognition of the fact that the treaty power had only *promised* to admit the new territory. It was held by the objectors that only the States, as the copartners to the compact, could fulfil the promise; that, therefore, the new possessions must remain in the condition of colonies and be governed accordingly. "The union of the States was formed on the principles of a copartnership, and it would be absurd to suppose that the agents of the parties, who have been appointed to execute the business of the compact in behalf of the principals, could admit a new partner without the consent of the parties themselves."<sup>1</sup> As to whether the treaty-making power could incorporate the inhabitants of ceded territory with the citizens of the United States, no doubt Jefferson and Madison and the men of their time denied such power. That such territory and its inhabitants would be incorporated by the treaty itself and brought under the Constitution in spite of its stipulations was not to be supposed. But it was soon subsequently allowed, and it is now not denied, that Congress was competent to fulfil this treaty promise, which it did by the admission of Louisiana in 1812.

In replying to the third objection, that the Constitution required the customs dues to be uniform throughout the United States, Nicholson, a leader of the Jeffersonian Republicans in the House, said that the Territories of the United States were no part of the United States; that they were possessions of the United States and only became integral parts of it when they were admitted into the Union as States. The Territories of the country were in the nature of Colonies and might be governed by the American Government as it saw fit without regard to the restrictions of the Constitution. "Louisiana is a

<sup>1</sup> Speech of Griswold, *Annals of Congress*, 1803-1804, p. 461.

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territory purchased by the United States in their confederate capacity, and may be disposed of by them at pleasure. It is in the nature of a colony whose commerce may be regulated without any reference to the Constitution.”<sup>1</sup>

In harmony with this political view, the act of Congress organizing a temporary government for Louisiana gave the President of the United States the same power over the territory that had been exercised by the King of Spain, until Congress should decide upon a permanent form of government. It was seen to be necessary that the United States should take possession of the country in the capacity of sovereign to the same extent as that of the Governments of France and Spain. It was maintained that there was no Constitution so far as the Territories were concerned. In 1803, Jefferson signed a bill which put him in possession of absolute power over the people of Louisiana. Afterwards, the permanent government for Louisiana, provided in 1804, gave to the President power to appoint both the Governor and the Legislative Council, and the Governor might assemble and prorogue the legislature at his pleasure, and he had a negative on all legislative acts. Such a government was practically absolute and it was such as is not known to the Constitution. The limitations of the Constitution were not held to bind either Congress or the President in the early government of Louisiana.

The public policy pursued in our first territorial acquisitions has been followed in our last, and that policy has now received in the late Insular cases the sanction of constitutional law in a decision of the Supreme Court.

In the treaty which closed the Spanish War in 1898, sovereignty over Porto Rico and the Philippines

Civil Government for Louisiana in 1804 Was Absolute.

Status of Inhabitants of Ceded Islands to be Determined by Congress.

<sup>1</sup> Gordy's *History of Political Parties*, vol. i., pp. 431-432.

was ceded to the United States, and it was provided in the treaty that the "civil and political status of the native inhabitants shall be determined by Congress."

As a point of constitutional law the question of the extent of congressional power in these islands came before the Supreme Court in a case to determine whether Congress had power to establish a different revenue system for the ceded territory from that which applies "throughout the United States." The Constitution says that "all duties, imposts, and excises shall be uniform throughout the United States."

In November, 1900, after the passage of the Foraker Act providing a civil government for Porto Rico, an importer shipped into New York some oranges from that island. Duties were demanded on these oranges under the Foraker Act. The former case,<sup>1</sup> in which the Court held that Porto Rico was domestic, not foreign, territory, came up after the treaty cession of the island, but before Congress had passed an act for its civil government. The latter case, testing the extent of congressional power, arose after Congress had passed an act organizing Porto Rico into a Territory, and providing for the laying of duties upon imports from the island different from the duties on importations from foreign countries. Such different duties, of course, could not be laid at all if Porto Rico were a part of the United States. If Porto Rico were a part of the United States in the sense in which Indiana or Arizona or New Mexico or California is, no duties could be laid upon her products any more than duties could be laid upon a cargo of oranges brought from San Francisco to Chicago. It will be seen that this case involved the whole question of the power of Congress over the Territories,—whether this power is unlimited and plenary, or whether it is limited by the restraints of the Constitution.

<sup>1</sup> The De Lima case.

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In concluding its decision the Supreme Court said :

“Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called ‘the American Empire.’ Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action. We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker Act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.”<sup>1</sup>

X

It was thus held that the uniform revenue clause of the Constitution does not bind Congress in the government of the ceded islands. In respect to a customs law for the island the power of Congress is not determined by

<sup>1</sup> Supreme Court decision, *Downes vs. Bidwell*, May, 1901.

the Constitution. The Constitution of the United States in this particular is not the constitution for Porto Rico.

This was all that was *decided* in this case. Whether other constitutional restrictions apply to the ceded territory, and, if so, which apply, remains to be determined. But the decision is significant of more than this, because of its political bearings. The governmental principles or the *politics* for the guidance of statesmen that have been deduced from this decision may be summarized as follows:

**The Politics of the Supreme Court Decision.** The people of the ceded Islands are under the complete sovereignty of Congress; in the exercise of this sovereignty Congress, representing the people of the United States, is controlled by

no legal limitations except those that may be found in the treaty of cession; the people of the Islands have no right to have these islands treated as States, or to have them treated as the Territories previously held by the United States have been treated; they have no *legal* rights under the provisions of the Constitution; territory can now be acquired which does not contemplate statehood; our Constitution was established for the people of the United States themselves and to meet the conditions existing upon this continent, and therefore the people of the new territory can assert against Congress no legal right whatever not found in the treaty of cession.<sup>1</sup> The only restraint imposed upon Congress in the government of the Islands is the restraint of *moral* and customary law, or the law of precedent, or such limitations as public opinion may impose; the written Constitution does not apply to the new Territories. Their inhabitants are not *citizens* of the United States, *but subjects*, they are not members of the body politic for whom the Constitution was made, but are under its government and subject to its control; these territories are not a part of the United States until made so by an act of Congress but are only

<sup>1</sup> Report of Secretary of War, 1899.



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dependent colonies, or appurtenances, or possessions of the United States, and that therefore the prohibitions of the Constitution on the power of Congress do not apply in their government; Congress has a free hand to do as the public welfare may demand.

Those who oppose the decision see more dangerous political aspects within it,—political features that lay the axe at the very root of constitutional govern- Objections to  
the Decision.ment. If in governing the Territories the Constitution can be set aside in one particular it can be set aside in all; if the principle of this decision is to be extended and carried to its logical conclusion Congress may, if it choose, assess an export tax at any territorial port, or impose import duties not uniform with those at other ports of the United States, or pass *ex post facto* laws, bills of attainder, or grant titles of nobility, deny the right of trial by jury, or the right of free speech or a free press; in short, the government of Congress for the Territories is sovereign, supreme, and absolute, unlimited by any part of the Constitution, and the people of the new territories hold their rights of life, liberty, and property at the absolute will of Congress.

The decision of the Court by no means involves all these conclusions. The decision does not assert that none of the articles of the Constitution apply to Porto Rico, The Justices concurring in the decision recognized the necessity of guarding against such conclusions. Justice Brown, in announcing the judgment of the Court, said:

“There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only ‘throughout the United States,’ or among the several States. Thus when the Constitution declares that no bill of attainder or *ex post facto* law shall be passed and that ‘no title of nobility shall be granted,’ it goes to the competency of Congress to pass a bill of that description.”

The same remark applies to the prohibitions contained in the amendments, but as these amendments were not involved in the case the Court very properly declined to express an opinion as to how far the bill of rights contained in the first eight amendments is of general and how far of local application.

The decision of the Court continues:

“There may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments, and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage, and to the particular method of procedure pointed out in the Constitution which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals. Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments,—it does not follow in the meantime, awaiting that decision, that the people are in the matter of personal rights unprotected by the provisions of our Constitution, and subject to the merely arbitrary control of Congress. Even if regarded as aliens they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this Court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. We disclaim

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any intention to hold that the inhabitants of these territories are subject to an unrestrainable power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect." <sup>1</sup>

Also Justice White, one of the majority assenting to the decision of the Court, but not to the ground of that decision, declared that "undoubtedly there are general prohibitions of the Constitution which are an absolute denial of all authority under any circumstances or conditions to do particular acts, and these are limitations that cannot under any circumstances be transcended," and "there is no reason to contend that Congress can destroy the liberties of the people of Porto Rico by exercising powers against freedom and justice which the Constitution has absolutely denied."

Not only the judges who gave the decision, but the statesmen who are responsible for the political policy that it sustains, deny that the people of the ceded islands are deprived of all guarantees to their civil rights. To deny the application of the Constitution to Porto Rico is not to deny to its people civil rights; it is not to deny the guarantees of peace and order, the right to life, liberty, property, and the pursuit of happiness. These are guaranteed by laws and forces that are anterior to the Constitution and above it. A constitution does not create a body politic; a body politic, already in the possession of recognized rights, creates a constitution. A constitution does not beget and confer personal and political freedom; it is not the fountain of law nor the origin of private rights. The Constitution is the consequence, not the cause, of these things. It grants no rights to the people, but it is the creature of their power, the instrument to secure and defend these rights. As an instrument of government it

Guarantees to  
Civil Rights  
are Not  
Denied.

<sup>1</sup> Justice Brown's decision of the court, *American Law Review*, July-August, 1901, pp. 599-600.

is based upon the pre-existing condition of laws, rights, habits, and modes of thought.<sup>1</sup>

These are the real principles and forces that make the Constitution and the laws and that extend the beneficence

There Are  
Unwritten  
Guarantees.

of these laws over increasing peoples. In Anglo-Saxon history they have not always been written, but they have always been effective. The rights of the people of the ceded islands are guaranteed by these principles and forces, or by what has been called the *spirit of the Constitution and its unwritten law*. Custom, usage, precedent, our political habits, public expectation, the spirit and love of American liberty, the fundamental principles on which the nation was founded and by which it is guided,—all these are the forces to be relied upon to restrain the power of Congress in the government of the Territories. Congress is bound by all the past principles and practices of the nation to secure all people subject to its jurisdiction against unreasonable searches and seizures; to accord the right to a speedy and public trial; to prevent excessive bail; to prevent the establishment by state authority of a state church; to prevent *ex post facto* acts and bills of attainder; to prevent slavery except in punishment for crime, and civil discriminations on account of race or color. Congress is bound to defend these rights for the people of the Territories, not because the people there can claim privileges under the Constitution but because the nation may not violate the fundamental principles on which the Constitution was made.

“The people of the ceded islands have acquired a moral right to be treated by the United States in accordance with the underlying principles of justice and freedom which we have declared in our Constitution, and which are the essential safe-

<sup>1</sup> Hamilton *vs.* St. Louis County Court, 15 Missouri, 13, cited in the *American Law Review*, January-February, 1901, in a valuable article on “The Consent of the Governed.”

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guards of every individual against the powers of government, not because those provisions were enacted for them, but because they are essential limitations inherent in the very existence of the American Government.”<sup>1</sup>

“Doubtless Congress, in legislating for the Territories would be subject to those fundamental limitations in favor of personal rights which are formulated by the Constitution.”<sup>2</sup>

The new decision and policy with reference to our island possessions may mean, then, at the most, only that the government of Congress for the Territories is a government under an unwritten constitution instead of a government under a written Constitution. To say that the islands acquired in the war with Spain are not to be regarded as a part of the United States, and that their inhabitants are not citizens of this country protected by the provisions of our Constitution,—this is not to say that they have no rights recognized by our Government; that they are not entitled to trial by jury, to the writ of *habeas corpus*, to representation as the basis of taxation, to move and speak and write freely, to acquire property and to make contracts and to have these contracts enforced. These rights are theirs by a higher law than that of the Constitution.

The Government for the Island Colonies Is One of an Unwritten Constitution.

X

As to the application of the Constitution in its restrictions and limitations, this may come to the people of a ceded territory in various ways:

1. *By express extension of the Constitution over a Territory by specific act of Congress.*—The Constitution does not extend to a new territory by its own power (*ex propria vigore*), but an act of Congress is necessary to make it apply. An issue was raised before the Supreme Court whether a citizen of the District of Columbia was entitled

How Constitutional Rights are Expressly Guaranteed:  
1. By Act of Congress.

X

<sup>1</sup> Hon. Elihu Root, Secretary of War, Report, 1899.

<sup>2</sup> Justice Bradley, in *Mormon Church vs. United States*. 136 U. S., i., 44.

to the provisions of the Constitution relating to trial by jury.<sup>1</sup> It was held that he was so entitled. But this was

**Trial by Jury in the District of Columbia: How Secured.** because an act of Congress, February 21, 1871, expressly extended the Constitution to the District of Columbia and because, also, that District had been carved out of Maryland and

Virginia, both of whose Constitutions guaranteed this right to their people. When Congress by specific act has once extended the provisions of the Constitution over a new territory, and thus fixed its constitutional status, that status cannot be subsequently changed by a withdrawal of the Constitution. As the Supreme Court has said, there are some steps that cannot be retraced.

2. *By the organic law of Congress for the Territory; i. e., the Organizing Act.*—An act of the legislature of

**2. By the Territorial Act.** Iowa dispensing with a jury in certain common-law actions was held void.<sup>2</sup> But this was because the organic law of the Territory of Iowa, the Organizing Act, by express provision extended the laws of the United States, including the Ordinance of 1787, over the Territory. This Ordinance provides for trial by jury. So the act of Iowa was void because of its conflict with congressional legislation, which had made certain preliminary provisions the fundamental law of the State.

3. *By Treaty Provisions.*—In order to modify the otherwise unlimited powers of Congress over the territory acquired by treaty it has been deemed necessary to insert limiting provisions in the treaties of acquisition.

In all the territorial treaties save that relating to Alaska provision has been made that the territory acquired should be incorporated into the Union as soon as possible, and that in the meantime the civil rights of the inhabitants should be guaranteed. In the Alaska Treaty with Russia

**All Previously Ceded Territory to be Incorporated into the Union**

<sup>1</sup> Callan vs. Wilson.

<sup>2</sup> Webster vs. Reid, 2 Howard, 437.

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(1867) no provision was made for the incorporation of the Territory into the Union, but provision was made that the inhabitants should have the immunities of citizens of the United States and protection in the enjoyment of their liberty, property, and religion. *Had not these terms been made in the treaties the territories acquired would have become subject to the legislation of Congress without limitation.* The guarantees to the people are the guarantees secured by the treaty. In the case of territory acquired with no limitations upon the power of Congress, its power is absolute and exclusive except in so far as it is limited by the Thirteenth Amendment, which prohibits slavery in any place over which the United States has jurisdiction.<sup>1</sup>

The minority view of the Court in the Insular cases is based upon two fundamental contentions:

1. The term "United States" used in the revenue clause of the Constitution comprehends the Territories as well as the States.

2. The National Government is one of enumerated powers, and these powers cannot be increased in any part of the Republic's territory or within its jurisdiction, except by an amendment to the Constitution.

As to what the term "United States" means in the Constitution, the answer was given by Chief Justice Marshall, supported by the entire Court, in 1820:

"This question can admit of but one answer. It is the name given to our great Republic which is composed of States and Territories. The District of Columbia or the territory west of the Missouri is not less within the United States than Maryland or Pennsylvania, and it is not less necessary, on the principles of our Constitution that uniformity in the imposition of imposts, duties, and excises should be observed in one than in the other."

<sup>1</sup> House Report, 249, February 8, 1900, 56th Congress, 1st session.

As to whether the National Government can exercise unrestricted powers in the Territories, from *Marbury vs. Madison* until the late decisions no utterance of the Court has intimated a doubt that in its operation the National Government is one of enumerated powers. In the *Dred Scott* case the antislavery minority agreed with the proslavery majority that the power to legislate respecting a Territory was limited by the restrictions of the Constitution,—as Justice Curtis expressed it, “by the express prohibitions on Congress not to do certain things.” Justice McLean, though asserting the power of Congress over the Territories to prohibit slavery, said, “No powers can be exercised which are prohibited by the Constitution, or which are contrary to its spirit.” Associate Justice Harlan sets forth very ably the view of the minority:

“If it be said that this doctrine restricts the sovereignty of our nation, the answer is that the sovereignty of the nation under our system resides in the people, the Tenth Amendment expressly reserving to the States and the people all powers not expressly delegated to the National Government. If the government of distant colonies and territories unrestricted by the Constitution seems desirable to the sovereign power, the people of the United States, they may amend the Constitution, but those who expound it can do nothing so absurd or mischievous or repugnant to its general spirit as to give it a construction not warranted by its words.

“The protection of a written Constitution against the arbitrary power of the government is as essential to the unrepresented people of our new possessions as our fathers knew it to be for the people of our own land.

“Congress has no existence and can exercise no authority outside of the Constitution. It is not true that Congress may deal with new territory just as other nations may. This nation is under the control of a written Constitution, the supreme law

Justice  
Harlan's  
Dissenting  
View.



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of the land. This is the only source of the powers which our government or any branch of it may exert. Monarchical governments, unrestrained by written Constitutions, may do with newly acquired territories what this government may not do. To say otherwise is to concede that Congress may, by action taken outside of the Constitution, engraft upon our republican institutions a colonial system such as exists under monarchical governments. Such a result was never contemplated by the Fathers of the Republic.

“The Constitution is supreme over every foot of territory under the jurisdiction of the United States. Concessions cannot be made for emergencies. We cannot violate the Constitution in order to serve particular interests. The meaning of the Constitution cannot depend upon accidental circumstances arising out of the products of other countries, or of this country. The ceded territory cannot be under the Constitution for one purpose and not for another. The people who ordained the Constitution never supposed that a change would be made in our system of government by mere judicial interpretation. If Porto Rico may be treated as though not a part of the United States then New Mexico and Arizona may be so treated and be subjected to such legislation as Congress may choose to enact without any reference to the restrictions of the Constitution.”

Justice Harlan then proceeds to consider the undefined process by which a people are to be incorporated into the political community known as the United States. If the treaty, and the payment of the money agreed to and the Foraker Act organizing a civil government for Porto Rico,—if these steps do not “incorporate” the island into the United States, he is unable to see how it can be done by a mere resolution.<sup>1</sup>

Judging from the varying *opinions* of the judges who agreed in the *judgment* of the Court it is not unreasonable to suppose that this decision may be reversed in a

<sup>1</sup> Justice Harlan, dissenting opinion in Porto Rican cases.

subsequent case and that, at least in other aspects if not in this, the Constitution may be made to apply to the Territories in restraint of congressional power. As a public policy the rule here indicated may be at any time reversed by the people. It is not certain that this decision is to be the final judgment of the Court. It is not certain that in the expansion of the Republic a rule has been established to

govern for all time to come, according to which, although new territory may be acquired, the Republic will not expand with its principles of government but will simply accumulate possessions and colonies to be governed by an external will imposed upon them. No future

course is certain. It is only the past that is secure. But, judging from the past, no one can doubt that in the law and politics so recently applied in the government of distant colonies the Republic has marked a great departure. If there was any fundamental principle in politics for which our fathers contended in the American Revolution; if there is any that may be said to have been made sacred by the struggles of American history; if there is any principle which we have sought for a century to apply in the government of States and Territories, it is that the rights, liberties, immunities, and constitutional privileges of the citizen abide in the local bodies, Colonies and States, and that one body politic should not have unrestrained legislative power over the trade, revenues, property, lives, and liberties of another. To make this principle forever sure against the usurpations of government, reliance was not to be placed merely on "certain principles of natural justice inherent in Anglo-Saxon character," but a fundamental law defining the limits of government should be ordained and established whose limits might not be transcended by governmental agents. If the existence of a written Constitution cannot save us from the violation of this principle it is yet to be seen whether

Our Colonial  
Government  
Marks a  
Fundamental  
Departure in  
our Political  
System.

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the forces described as the unwritten Constitution will be able to do so. History has illustrated in so many ways the vital importance of this principle that it is safe constantly to remind the citizenship of America that, as one of our own prophets has said, the Republic can last no longer than its people are faithful to the ideals and principles of its founders.<sup>1</sup>

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<sup>1</sup> James Russell Lowell.



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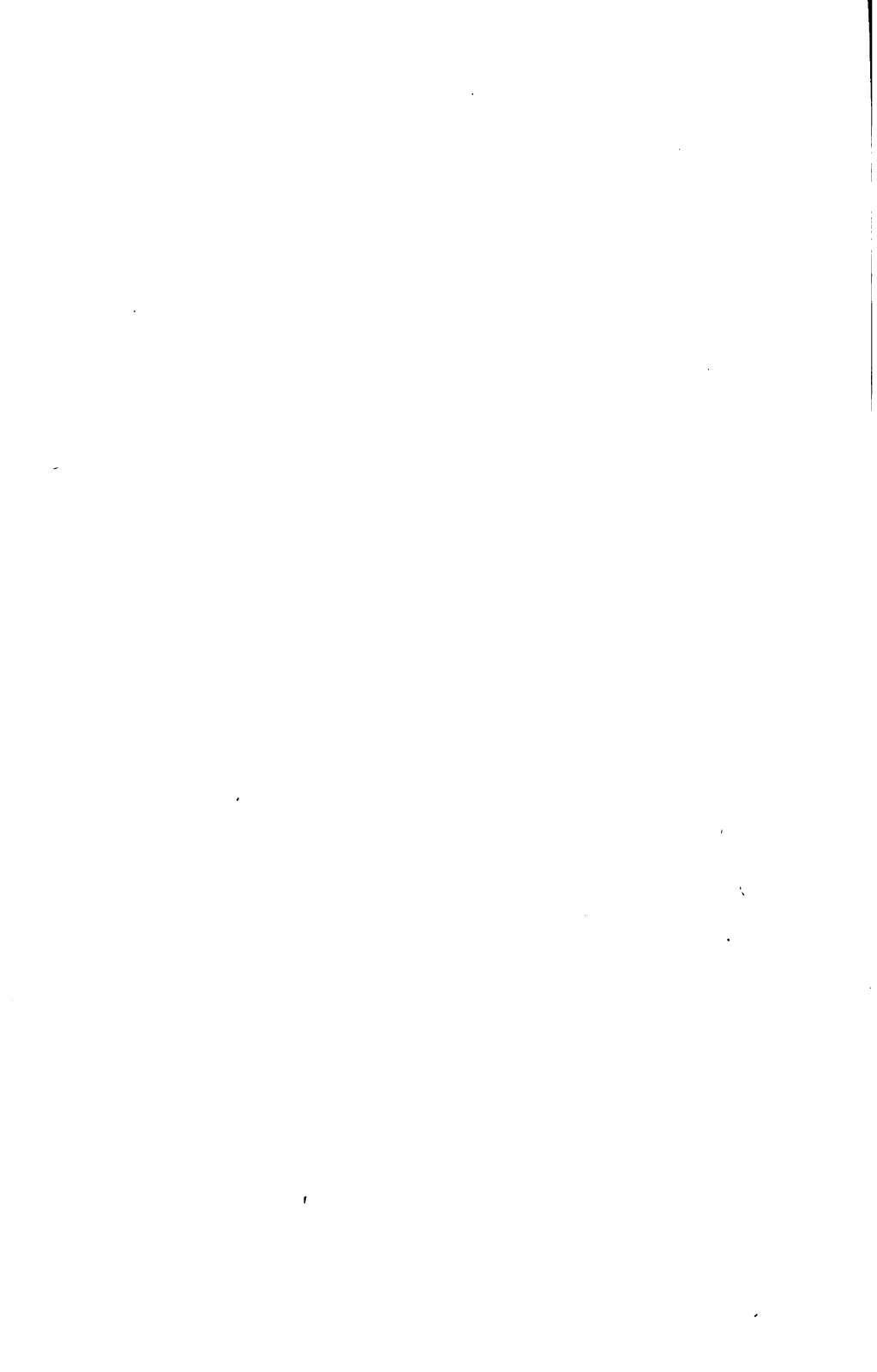
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